STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION,

_____/

Supreme Court No. 161492

USDC-WD: 1:20-cv-414

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, and JEFFERY GULICK,

Plaintiffs,

v

GOVERNOR OF MICHIGAN, MICHIGAN ATTORNEY GENERAL, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES DIRECTOR,

Defendants.

PLAINTIFFS' APPENDIX

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Plaintiff's Appendix

Table of Contents
Volume I of I

Unpublished Cases

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, WELLSTON MEDICAL CENTER, PLLC, PRIMARY HEALTH SERVICES, PC, AND JEFFERY GULICK

Plaintiffs,

vs.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, DANA NESSEL, in her official capacity as Attorney General of the State of Michigan, and ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services,

Defendants.

Case No. 1:20-cv-414

Hon.

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VERIFIED COMPLAINT

The Plaintiffs comprise medical providers and a patient seeking vital medical services during this re-declared state of emergency. They file this Complaint for declaratory

judgment, injunctive relief, damages, and other relief to vindicate their rights under the United States and Michigan Constitutions and to preserve their ability to safely provide and obtain necessary healthcare services as Michigan citizens, as detailed below:

1. The COVID-19 pandemic and its initial spread in the United States and Michigan represented an extraordinary challenge for the citizens of Michigan and its elected representatives. Initial projections based on some models projected widespread infection of the population that would overwhelm our hospitals and healthcare systems, resulting in a massive number of deaths. One model from the CDC projected between 160 to 214 million infections and between 200,000 to 1.7 million deaths nationwide.[1] Such projections and the lack of available data on U.S. cases put governmental leaders in very difficult spots. Nonetheless, based upon those projections, government leaders made hard decisions on how to best to protect the health of their citizens, while acting within the bounds of controlling constitutions and established law.

2. Fortunately, however, the projections upon which the government leaders made their decisions back in March 2020 were grossly inaccurate. Set forth below is a comparison of the projections made by the CDC in early 2020 with the actual data as of May 10, 2020.

Data	**CDC Projections**	**Actual Numbers[2]**	**Comparison of Actual Numbers to CDC Projections**
Number of people infected nationwide	160 million to 214 million	1,324,488	0.8% to 0.6% of projection
Number of deaths nationwide	200,000 to 1.7 million	79,756	39.9% to 4.7% of projection

[1] Chas Danner, *CDC's Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Magazine Intelligencer, updated Mar. 13, 2020, available at https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html.

[2] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last updated May 11, 2020; last visited May 12, 2020).

3. Many decisions made in immediate response to protect against the COVID-19 threat and the dire, potential public health crisis resulted in severe restrictions on the rights and liberties of both private individuals and businesses. Michigan was no exception.

4. Since early March 2020, Michigan Governor Gretchen Whitmer has taken drastic, unprecedented, unilateral executive actions in an effort to address the spread of the virus that causes COVID-19—declaring a state of emergency in the State of Michigan and justifying her restriction on rights and liberties based on the very important goal to "flatten the curve" and avoid overwhelming Michigan's healthcare system and hospitals.

5. Thankfully, the goal of flattening the curve has been achieved, and the dire predictions of overwhelmed hospitals have not come to pass.

6. During a press conference on Monday, April 27, 2020, Governor Whitmer acknowledged that the curve has flattened in Michigan. Graphics depicted that while Governor Whitmer's administration anticipated 220,000 patients being hospitalized without social distancing efforts, there had only been 3,000 hospitalizations as of April 27. That is less than 1.4% of the projected COVID-19 hospitalizations underlying the Governor's declared states of emergency and disaster.

7. According to data released by the State of Michigan, hospitals in the state are well-stocked with over 2,400 available ventilators, nearly 1,000 available ICU beds, and more than 7,000 available hospital beds.[3]

[3] https://www.michigan.gov/coronavirus/0,9753,7-406-98159-523641--,00.html (last updated May 11, 2020; last visited May 12, 2020).

8. On May 7, 2020, Governor Whitmer announced a six-phase plan to reopen Michigan's economy titled "MI Safe Start." Governor Whitmer stated that Michigan was in the third phase, called the "Flattening" phase, in which "[c]ase growth is gradually declining."[4]

9. But even in the Flattening phase, the reopening of the economy is strictly limited to only "[s]pecified lower-risk businesses with strict workplace safety measures." Only in later phases does the Governor's plan permit the retail sector, offices, restaurants, and bars to reopen. And the Governor has not indicated when medical services deemed "non-essential" by her executive order will be permitted to resume.

10. In the Governor's view, Michigan will not reach the sixth "Post-pandemic" phase anytime soon. From the Governor's perspective, Michigan enters that phase only once the state has achieved "sufficient community immunity" and there is "high uptake of an effective therapy or vaccine." The mumps vaccine holds the record for the fastest ever approved vaccine—with development and approval in 4 years.[5]

11. Governor Whitmer's MI Safe Start Plan warns that at any time, "it is also possible to move backwards"—and reenter earlier phases of the emergency—"if risk increases and if we stop adhering to safe practices." There is a real possibility that Governor Whitmer continues for many months, if not years, to enact measures that burden the rights and liberties of individuals and businesses without legislative input. Michigan is under an unlawfully re-declared state of emergency, with the Executive Branch dictating the law, and there is no end in sight.

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[4] MI Safe Start: A Plan to Re-Engage Michigan's Economy, Gov. Gretchen Whitmer, available at https://content.govdelivery.com/attachments/MIEOG/2020/05/07/file_attachments/1446147/Governor%20Whitmer%27s%20MI%20Safe%20Start%20Plan.pdf (published May 7, 2020; last visited May 12, 2020).

[5] Donald G. McNeil, Jr., *The Coronavirus in America: The Year Ahead*, New York Times, April 18, 2020, available at https://www.nytimes.com/2020/04/18/health/coronavirus-america-future.html.

12. Meanwhile, medical providers are on the brink of financial ruin, facing extreme revenue shortages caused by the Governor's order forcing the postponement or cancellation of so-called "non-essential" procedures. Thousands of healthcare workers across Michigan have been furloughed or laid off.

13. The Michigan Legislature permitted Governor Whitmer to take extraordinary and immediate executive action during the first month of Michigan's response to the pandemic and even granted a 23-day extension. But the Michigan Legislature declined to extend Governor Whitmer's declaration of a state of emergency beyond April 30, 2020. The Legislature's decision not to extend the state of emergency constituted its determination that, now that Michigan had its bearings about the nature of the pandemic, the Legislature could resume its constitutionally mandated role of legislating based upon policy for what is no longer an emergency but a long-term challenge.

14. But instead of permitting the Legislature to resume its ordinary policy-setting and law-making role, Governor Whitmer simply re-declared exactly the same state of emergency that Michigan law required, and the Legislature directed, to be terminated. Under Governor Whitmer's interpretation of the relevant statutes, she may continue to re-declare a state of emergency serially, for as long as she determines that the pandemic continues to constitute an "emergency."

15. No one disputes that the exercise of executive power may be necessary in some time-limited, emergency situations. But the Governor's sweeping assertion that she can rule by emergency powers, potentially for years and without any regard for the Legislature, exceeds the scope of her statutory authority and violates the safeguard of the Michigan Constitution's Separation of Powers clause. This is an extraordinarily dangerous precedent to set. "While the law

may take periodic naps during a pandemic, we will not let it sleep through one." *Maryville Baptist Church, Inc. v. Beshear*, __ F.3d __, 2020 WL 2111316, at *4 (6th Cir. May 2, 2020).

16. The Governor's executive orders—including Executive Orders 2020-17 and 2020-77, which prohibit all "non-essential" medical treatments and expansive categories of in-person work, respectively—are predicated upon Governor Whitmer's improper attempts to re-declare a state of emergency that has already been terminated. They therefore cannot be applied to the Plaintiffs.

17. And even if it was appropriate for the Governor to re-declare over the Legislature's objection exactly the same state of emergency that had just been terminated, the executive orders cannot constitutionally be applied to the Plaintiffs for many other reasons. As applied to the Plaintiffs, the executive orders are unconstitutionally vague; they violate procedural and substantive due process; and they violate the dormant commerce clause.

18. The Plaintiffs are suffering immeasurable and irreparable harm from the Governor's executive orders. Plaintiffs who are healthcare providers are unable to provide preventive medical care to their patients. Patients, one of whom is also a Plaintiff in this action, are unable to receive the care they need. This has led to widely documented instances of patients whose conditions become drastically worse while they wait for care that is vital to their health yet deemed "non-essential" by Governor Whitmer. Plaintiffs who are healthcare providers are also facing dire financial outlooks that could very well spell disaster for—and permanent shuttering of—their businesses. At minimum, Plaintiffs will suffer irreparable harm in the form of lost business goodwill within the community and with the patients they serve, particularly if they are perceived as engaging in conduct that Executive Orders 2020-17 and 2020-77 have deemed to be

criminal in nature. They will also suffer irreparable harm through the deprivation of their constitutional rights. Preliminary and permanent injunctive relief is necessary in this case.

Jurisdictional Allegations

19. Plaintiff Midwest Institute of Health, PLLC, d/b/a Grand Health Partners ("Grand Health"), is a Michigan limited liability company with its principal place of business located at 2060 East Paris Ave., SE, Suite 100, Grand Rapids, MI 49546.

20. Plaintiff Wellston Medical Center, PLLC ("Wellston Medical Center") is a primary care center located at 14477 Caberfae Hwy Wellston, Michigan 49689.

21. Plaintiff Primary Health Services, PC ("Primary Health Services") is a primary care center located at 505 W Ludington Ave, Ludington, MI 49431.

22. Plaintiff Jeffery Gulick is a resident of Owosso, Michigan, who was scheduled to undergo knee replacement surgery on March 20, 2020.

23. Defendant Gretchen Whitmer is the Governor of Michigan and has issued more than 70 Executive Orders during the declared and re-declared emergency, including Executive Orders 2020-17 and 2020-77 that are at issue in this Complaint. She is being sued in her official capacity.

24. Defendant Dana Nessel is the Attorney General of Michigan and has authority to enforce Michigan law. She is being sued in her official capacity.

25. Defendant Robert Gordon is the Director of the Michigan Department of Health and Human Services. He is being sued in his official capacity.

26. The Court has original jurisdiction over this civil rights case under 28 U.S.C. § 1331, 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The Court has supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367.

27. This Court has authority to award the requested injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65, the requested declaratory relief under 28 U.S.C. § 2201-02 and Federal Rule of Civil Procedure 57, and damages and attorneys' fees under 28 U.S.C. § 1343, 42 U.S.C § 1983 and 42 U.S.C. § 1988.

28. Venue in this district is proper because a substantial part of the events or omissions giving rise to the claim occurred in this district, *see* 28 U.S.C. § 1391(b)(2).

General Allegations

The Provider Plaintiffs Can Conduct Their Business Operations Safely

29. Plaintiffs Grand Health, Wellston Medical Center, and Primary Health Services (together, the "Provider Plaintiffs") in this action recognize that the safety of their employees and patients is and remains a paramount concern, and that additional steps to protect against the spread of the virus that causes COVID-19 should be taken by each employer consistent with CDC guidance. Each of the Provider Plaintiffs has already implemented procedures and precautions to ensure that it can safely operate in Michigan during the COVID-19 pandemic.

30. Grand Health was established in 2008 and operates out offices in Grand Rapids, Petoskey, and Grand Haven, Michigan. Its medical staff—which currently consists of eight licensed medical doctors and a full staff of physicians' assistants, dieticians, exercise physiologists, and behaviorists—provides a full complement of surgical and non-surgical weight loss solutions for patients. Grand Health's physicians provide not only bariatric surgery services but also general surgery services, including laparoscopic cholecystectomy (gallbladder removal), appendectomy, and various types of hernia surgery and repair. Grand Health also provides endoscopic and colonoscopy services. All endoscopy services and pre- and post-operative care and medical programs take place at Grand Health's offices, but all surgeries occur at area hospitals, at which Grand Health's physicians have admitting privileges.

31. Grand Health and its patients have been enormously impacted by Governor Whitmer's prohibition against the provision of bariatric and "non-essential" medical services since March 21, 2020. Obesity is one of the highest risk factors for morbidity, and timely preventive care is vital for many of Grand Health's patients. Many of Grand Health's weight-loss patients are lower income individuals, many of whom require surgery as a prerequisite for joint replacement surgery. The delay imposed by the prohibition of bariatric surgery has caused these individuals to suffer agonizing pain in the interim. Grand Health physicians have also seen an increase in cases where patients have been unable to obtain medical care until their condition has progressed far beyond a state in which it would have been easily treatable. For example, patients are obtaining surgery only after their gallbladder is gangrenous or their appendix is ruptured, instead of obtaining care when their condition was in a much less severe state. Although Grand Health continued to provide minimal levels of emergent care to its patients, Grand Health furloughed most of its employees and has pushed back almost all of its patients' procedures and post-operative support meetings. If the shutdown continues, Grand Health will almost certainly go out of business, and its medical staff will be out of work.

32. If permitted to fully reopen, there is no question that Grand Health can conduct its operations in a manner that will take precautions to prevent the transmission of the virus that causes COVID-19. All surgeries will occur at a hospital, consistent with surgical sanitation and COVID-19-compliant guidelines. Grand Health has implemented a plan under which its health care providers will screen all patients and staff when they come in, taking temperature and pulse oximeter readings. Most patients will wait in their car instead of in the waiting room; for those who cannot do so, Grand Health's waiting room has been reduced to half-occupancy, thereby allowing for social distancing. Finally, staff in Grand Health's endoscopy

center will wear medical facemasks, including N95 respirator masks during any medical procedure, and will use half of the available surgical bays in order to ensure appropriate distance between medical teams.

33. Wellston Medical Center and Primary Health Services are primary care clinics in West Michigan. They serve patients in primarily rural communities surrounding Wellston and Ludington. Over 90% of their patients are on Medicaid or Medicare. Much of the medical care they provide is not emergency care, but it is extremely important. For example, one patient had a stent in his ureter as a result of a kidney stone. The stent was supposed to be removed in two weeks. That procedure could not be scheduled for two months, resulting in a bladder and kidney infection. The infection required hospitalization and emergency surgery.

34. These clinics have been devastated by the Governor's executive orders. Prior to March 2020, these clinics treated an average of 90-100 patients per day, with 16 staff members. Under the Governor's executive orders, the clinics cannot perform what the Governor deems "non-essential procedures" meaning a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider. When Executive Order 2020-17 was issued, the number of patients who were allowed to be treated dropped by 95%. If the shutdown continues, these clinics will almost certainly go out of business, and their medical staff will be out of work.

35. Plaintiff Jeffery Gulick was scheduled to undergo knee replacement surgery on his right knee on March 20, 2020, at Memorial Hospital in Owosso. Under the Governor's executive orders, his knee replacement surgery cannot go forward. Additionally, he could not receive follow up care for the knee replacement surgery that had been performed on his left knee.

He is in excruciating pain and unable to get prescription pain medication until he can be seen on June 11. As a result of the debilitating pain, Mr. Gulick has had to reduce his work hours by 80%.

36. If permitted to reopen, there is no question that Wellston Medical Center and Primary Health Services can conduct their operations in a manner that will take precautions to prevent the transmission of the virus that causes COVID-19. All treatment will occur in a manner that is consistent with appropriate sanitation and COVID-19-compliant guidelines. Patients and staff will be screened for signs of COVID-19 and contact with those with COVID-19. No more than two patients per hour will be scheduled. Finally, staff and patients will wear facemasks, and the reception area will be equipped with a clear barrier.

Governor Whitmer Issues Executive Orders Declaring a State of Emergency

37. On March 11, 2020, Governor Whitmer issued Executive Order 2020-04, which proclaimed a state of emergency under both the Emergency Management Act, Mich. Comp. Laws § 30.403, and the Emergency Powers of the Governor Act of 1945, Mich. Comp. Laws § 10.31. (**Exhibit 1**).

38. Governor Whitmer's executive order identified the COVID-19 pandemic as the basis for her declaration of a state of emergency under both statutory regimes.

39. The Emergency Powers of the Governor Act provides that all orders and rules promulgated by the governor during the state of emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." Mich. Comp. Laws § 10.31(2).

40. The Emergency Management Act provides that a governor's declaration of emergency may last only 28 days, after which "the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an

extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature." Mich. Comp. Laws § 30.403(4).

41. On April 1, 2020, Governor Whitmer issued Executive Order 2020-33, which replaced Executive Order 2020-04, declared a state of emergency pursuant to the Emergency Powers of the Governor Act, and proclaimed a state of disaster and a state of emergency under the Emergency Management Act. (**Exhibit 2**). These declarations were based on the same circumstances—that is, the dangers posed by the virus that causes COVID-19—that formed the basis of Executive Order 2020-04.

42. On April 1, 2020, Governor Whitmer also requested that the Michigan Legislature extend the state of emergency by an additional 70 days, as contemplated by the Emergency Management Act.

43. On April 7, 2020, the Michigan Senate and Michigan House of Representatives denied Governor Whitmer's request to extend the state of emergency for an additional 70 days. Instead, the Michigan Legislature extended the state of emergency declared by Governor Whitmer until April 30, 2020, but not beyond.

Governor Whitmer Issues Numerous Executive Orders, Including an Order That Prohibits the Provision of All Non-Emergency Medical Care

44. Meanwhile, Governor Whitmer issued many additional executive orders, invoking emergency powers that the Governor claims flow from the state of emergency declared under Executive Orders 2020-04 and 2020-33. As of May 8, 2020, Governor Whitmer had issued more than 70 executive orders related to the COVID-19 pandemic, creating and changing substantive state law and regulations that impact and burden wide swaths of the economy. A chart

summarizing the substantive changes to the law imposed by Governor Whitmer's executive orders is attached as **Exhibit 3**.[6]

45. One of these orders, Executive Order 2020-17, took effect on March 21, 2020 and remains in effect until the termination of the Governor's declaration of emergency. It provides that, until the termination of the Governor's declaration of a state of emergency, most medical providers are prohibited from providing any "medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider." (**Exhibit 4**).

46. Executive Order 2020-17 specifically prohibits medical providers from providing any bariatric surgery and joint replacement surgery services, "except for emergency or trauma-related surgery where postponement would significantly impact the health, safety, and welfare of the patient."

47. There are significant penalties for health care providers who violate the executive order. Executive Order 2020-17 provides that any willful violation of its provisions is a misdemeanor.

48. On May 3, 2020, Dr. Joneigh Khaldun, Chief Deputy Director Health at the Michigan Department of Health and Human Services, issued a general letter to Michigan health care providers, noting, "I recognize some have questions about Executive Order 2020-17, including what is allowable under the order and how to start to re-engage with patients for important care." Dr. Khaldun then provided her own interpretation of the language of Executive Order 2020-17 prohibiting non-essential medical care: "This wording is intended to be flexible, preserve clinician judgement, and encourage consideration on an individual basis of which patient

[6] The chart attached as Exhibit 3 was last updated as of 5 p.m. Eastern Time on May 11, 2020.

services can be safely delayed without resulting in a significant decline in health. **EO 2020-17 gives providers broad discretion to apply this standard**." (**Exhibit 5**).

49. It is not clear that Dr. Khaldun's interpretation of the Executive Order has any weight. Further, regardless of Dr. Kaldun's correspondence, Executive Order 2020-17 continues to prohibit bariatric and joint replacement surgeries and continues to impose criminal penalties for those who willfully violate the order.

Governor Whitmer Issues Several Stay-at-Home Orders Prohibiting Most In-Person Business Operations

50. Along with her other executive orders, Governor Whitmer issued at least five iterations of "Stay Home, Stay Safe" orders, specifically Executive Orders 2020-21, 2020-42, 2020-59, 2020-70, and 2020-77. Each of those orders imposes sweeping limitations on Michigan citizens' ability to travel and prohibits huge numbers of workers in Michigan from reporting to work.

51. On March 23, 2020, Governor Whitmer issued Executive Order 2020-21, citing as authority the Emergency Management Act and the Emergency Powers of the Governor Act. (**Exhibit 6**).

52. Executive Order 2020-21 went into effect on March 24, 2020. Among other restrictions, Executive Order 2020-21 restricts travel throughout the state and prohibits business operations "that require workers to leave their homes or places of residence" unless those workers are "critical infrastructure workers." (Exhibit 6, ¶ 4(a)). "Critical infrastructure workers" are defined as "those workers described" in a March 19, 2020 memorandum prepared by the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (the "March 19 CISA guidance"), along with a short list of other workers. (*Id.* ¶ 8). The March 19

CISA guidance is attached as **Exhibit 7**. Executive Order 2020-21 imposes criminal penalties for willful violations of the order. (Exhibit 6, ¶ 17).

53. On April 9, 2020, Governor Whitmer issued Executive Order 2020-42, attached as **Exhibit 8**, rescinding and replacing her previous stay-at-home order and extending the shutdown until April 30, 2020. Like the previous executive order, Executive Order 2020-42 prohibits in-person work by workers who are not "critical infrastructure workers" and imposes criminal penalties for willful violations of the order. (Exhibit 8, ¶¶ 4, 17).

54. Executive Order 2020-42 imposes significant restrictions that curtail basic liberties to a greater extent than were imposed by any other shutdown order issued by any other state. For example, under Executive Order 2020-42 large retail stores are prohibited from advertising almost all of their products and are also prohibited from selling products that are deemed nonessential, including materials related to the construction industry, such as paint, carpet, and flooring. Executive Order 2020-42 does not explain the rationale for prohibiting the purchase of these items, nor does it indicate how the prohibition of their sale was related to abating the emergency posed by COVID-19.

55. On April 24, 2020, Governor Whitmer issued Executive Order 2020-59, which became effective immediately and rescinded Executive Order 2020-42. (**Exhibit 9**).

56. Executive Order 2020-59 lifts certain business restrictions, permitting workers who are necessary to perform certain defined "resumed activities" to perform in-person work. Those "resumed activities" are defined as: (a) workers who process or fulfill remote orders for goods for delivery or curbside pickup; (b) workers who perform bicycle maintenance or repair; (c) workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations; (d) maintenance workers and groundskeepers for places of outdoor recreation; and (e) workers for

moving or storage operations. Businesses whose workers perform some "resumed activities" must implement enhanced social-distancing rules and measures listed in Sections 11(h) and 12 of Executive Order 2020-59. As with all of the other Stay Home, Stay Safe orders, a willful violation of Executive Order 2020-59 is a criminal misdemeanor.

57. On May 1, 2020, Governor Whitmer issued another update to the Stay Home, Stay Safe order, Executive Order 2020-70, which became effective immediately and rescinded Executive Order 2020-59. (**Exhibit 10**).

58. Executive Order 2020-70 continues the restrictions of the previous Stay Home, Stay Safe orders, but lifts restrictions on additional "resumed activities," including workers in the construction industry and the building trades, workers in the real-estate industry, workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections, and outdoor workers. In addition to the list of enhanced social-distancing rules and measures applicable to all resumed activities, construction businesses must implement other stringent measures listed in Section 11(i) of Executive Order 2020-70.

59. On May 7, 2020, Governor Whitmer issued Executive Order 2020-77, which became effective immediately and rescinded Executive Order 2020-70. This order continues the restrictions of the previous Stay Home, Stay Safe orders, but permits manufacturing workers to resume operations, subject to yet another set of stringent, enhanced workplace safety requirements listed in Section 11(k) of Executive Order 2020-77. (**Exhibit 11**). This is the controlling stay-at-home order as of the date of the filing of this complaint. As with all of the other Stay Home, Stay Safe orders, a willful violation of Executive Order 2020-77 is a criminal misdemeanor.

Governor Whitmer's Executive Orders Cause Enormous and Immediate Confusion

60. Almost immediately after her first shelter-in-place order (Executive Order 2020-21) was issued, the Attorney General and Governor were inundated with requests for clarification of the order. On March 24, 2020, Governor Whitmer observed, "We knew that there would be confusion, there always is."[7]

61. On March 25, the Attorney General's office admitted, "I think it's a difficult executive order to really wrap your arms around."[8] The Attorney General's office explained that its process of clarifying the meaning of the order occurred on an ad hoc, case-by-case basis: "Every instance we get a call asking about whether or not businesses essential is being first reviewed by our office and then shared with the governor's office so that we can begin to get some clarity around the executive order."

62. Meanwhile, the portion of Attorney General Nessel's official website that provides guidance to businesses and law enforcement regarding the definition of "critical infrastructure workers" has linked to the updated CISA guidance, instead of to the March 19 CISA Guidance. (**Exhibit 12**). As a result, a business seeking guidance from the Attorney General's office as to whether it performs "critical infrastructure" operations is directed to the updated CISA guidance that Executive Orders 2020-42, 2020-59, 2020-70, and 2020-77 explicitly reject.

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[7] Mikenzie Frost, *Gov. Whitmer says she understands confusion surrounding stay-at-home, urging patience*, WWMT, Mar. 24, 2020, available at https://wwmt.com/news/state/gov-whitmer-says-she-understands-confusion-surrounding-stay-at-home-urging-patience (last visited May 12, 2020).

[8] Malachi Barrett, *Michigan Attorney General asks local law enforcement to handle violations of coronavirus stay home order*, MLive, Mar. 25, 2020, available at https://www.mlive.com/public-interest/2020/03/michigan-attorney-general-asks-local-law-enforcement-to-handle-violations-of-coronavirus-stay-home-order.html (last visited May 12, 2020).

63. Despite the admitted confusion created by the orders, the Attorney General's office reiterated that violating the order could result in criminal penalties and forced closure of a business by law enforcement.[9]

The MDHHS Issues an Order Purporting to Authorize Enforcement Action Against Violations of Executive Orders and FAQs That Did Not Yet Exist

64. Meanwhile, Robert Gordon, the Director of the Michigan Department of Health and Human Services ("HHS"), issued an emergency order on April 2, 2020 that purports to impose penalties based on the constantly changing FAQ answers that are posted on the Governor's website. (**Exhibit 13**).

65. Specifically, the HHS order provides that "[t]he procedures and restrictions outlined in . . . EO 2020-21 and [its] accompanying frequently asked questions (FAQs) that may be updated from time-to-time (available at www.michigan.gov/coronavirus) are necessary to control the epidemic and protect the public health." (Exhibit 13, ¶ 1).

66. The HHS order further provides that "[l]aw enforcement is specifically authorized to bar access to businesses and operations that fail to comply with the procedures and restrictions outlines in . . . EO 2020-21 and its accompanying FAQs." (Exhibit 13, ¶ 4). The HHS order applies "to any future Executive Order that may be issued that rescinds and replaces . . . EO 2020-21." (Exhibit 13, ¶ 4).

67. As recognized in the HHS order, the FAQs accompanying Executive Order 2020-59 were updated and changed over time. In other words, the HHS order purports to determine that various executive orders and FAQ responses are "necessary to control the epidemic" even though some of the executive orders and FAQ responses were not yet in existence. It is impossible

[9] Virginia Gordan, *Local police to handle reports of violations of Gov. Whitmer's stay-at-home order*, Michigan Radio, Mar. 25, 2020, available at https://www.michiganradio.org/post/local-police-handle-reports-violations-gov-whitmers-stay-home-order (last visited May 12, 2020).

for HHS to have determined that future executive orders and FAQ responses were necessary when they did not yet exist and when HHS therefore did not know their substance or content. It is also impossible for businesses to comply with constantly changing and sometimes conflicting FAQ responses.

The Legislature Declines to Extend the Governor's Emergency Declaration, and the Governor Unilaterally Determines to Extend It Anyway

68. As indicated, the Emergency Management Act requires the Governor to declare that a state of emergency is terminated after 28 days if the legislature does not extend the emergency, and the Emergency Powers of the Governor Act states that any emergency declared under that statute terminates when the Governor declares that the emergency is terminated.

69. On April 30, 2020, the Michigan Legislature refused to extend Governor Whitmer's declarations of a state of emergency and a state of disaster.

70. Immediately after the Michigan Legislature refused to extend her emergency declarations, Governor Whitmer issued on April 30, 2020 three additional Executive Orders: 2020-66, 2020-67, and 2020-68.

71. Executive Order 2020-66 terminates the Governor's declarations of a state of emergency and a state of disaster based upon the COVID-19 pandemic, as required under the Emergency Management Act. (**Exhibit 14**).

72. Executive Order 2020-68 was issued only minutes after Executive Order 2020-66 was issued. Executive Order 2020-68 purports to re-declare under the Emergency Management Act exactly the same states of disaster and emergency that the Legislature refused to extend and which had just been terminated under Executive Order 2020-66. These renewed states of disaster and emergency purported to remain effective through May 28, 2020. (**Exhibit 15**).

73. Executive Order 2020-67 states that a "state of emergency remains declared across Michigan" under the Emergency Powers of the Governor Act and that the state of emergency remains in effect until May 28, 2020. The state of emergency that Executive Order 2020-69 references is exactly the same state of emergency that the Governor declared to be terminated in Executive Order 2020-66. (**Exhibit 16**).

The Governor Continues to Issue Revised Stay Home, Stay Safe Orders

74. After re-declaring a state of emergency notwithstanding the Legislature's refusal to extend it, Governor Whitmer continued to issue revised Stay Home, Stay Safe orders.

75. On May 7, 2020, Governor Whitmer issued Executive Order 2020-77, continues the restrictions of the previous Stay Home, Stay Safe orders, with limited exceptions.

76. Even though CISA updated its guidance twice—first on March 28 and again on April 17, 2020 (**Exhibits 17** & **18**)—Executive Order 2020-77 explicitly rejects both versions of the updated CISA guidance and continues to rely upon the March 19 CISA guidance for the definition of "critical infrastructure workers." The Executive Order does not explain its rationale for continuing to rely upon superseded and outdated CISA guidance.

77. By not adopting the most current CISA guidance, Executive Order 2020-77 relies on a different, more restrictive definition of "critical infrastructure workers" than the definition relied upon by other states, which creates confusion for businesses and their employees and needlessly restricts economic activity in the State of Michigan.

78. Executive Order 2020-77 does not provide any process through which a company that is not designated as "critical infrastructure" may challenge that designation.

79. A willful violation of Executive Order 2020-77 is a misdemeanor which could result in imprisonment for up to 90 days and a $500 fine.

80. After the Legislature refused to extend the Governor's declaration of emergency past April 30, Attorney General Nessel issued a letter to law enforcement officials asserting that the Governor's executive orders—including her Stay Home, Stay Safe orders—continued to be valid under the Emergency Powers of the Governor Act and directing that law enforcement officials continue to enforce the Governor's orders. Notably, the Attorney General did not defend the Governor's assertion of authority to unilaterally extend the emergency under the Emergency Management Act. (**Exhibit 19**).

81. Due to the harsh penalties imposed for violating Executive Order 2020-77 and the HHS order—including criminal penalties and potential revocations of necessary business licenses—the Plaintiffs are in a very difficult position. Either they need to cease operations despite the fact that Executive Orders 2020-17 and 2020-77 may be invalid or may allow them to continue, or they need to continue operations under the threat of criminal prosecution and loss of their licenses.

82. The Plaintiffs have suffered and will suffer immeasurable and irreparable harm if Executive Orders 2020-17 and 2020-77 are continued and/or enforced against them. If the Provider Plaintiffs are prohibited from providing medical treatment, they will almost certainly become insolvent or be forced to permanently close their operations. If Mr. Gulick is further delayed from obtaining knee replacement surgery, he will continue suffering unnecessary pain. At minimum, they will suffer irreparable harm in the form of lost business goodwill within the community and with their patients, particularly if they are perceived as engaging in conduct that Executive Order 2020-77 has deemed to be criminal in nature.

Causes of Action

Count I – Declaratory Judgment
(Unlawful Exercise of Authority Under State Law)

83. Plaintiffs incorporate all preceding allegations.

84. Executive Order 2020-17 and Executive Order 2020-77 are unenforceable because the Governor lacked authority to issue them or renew them after April 30, 2020.

85. In Executive Orders 2020-4 and 2020-33, Governor Whitmer proclaimed states of emergency and disaster based on COVID-19 and stated that those proclamations would terminate when the emergency conditions no longer exist "consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities," including Section 3 of the Emergency Management Act, which limits the Governor's authority to declare disasters or emergencies to 28 days. *See* Mich. Comp. Laws § 30.403(3), (4).

86. To support an executive order, both the Emergency Management Act, Mich. Comp. Laws § 30.403 and the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, require the continuation of the previously proclaimed states of emergency or disaster.

87. The Emergency Powers of the Governor Act provides that all orders and rules promulgated by the governor during the state of emergency "shall cease to be in effect upon declaration by the governor that the emergency no longer exists." Mich. Comp. Laws § 10.31(2).

88. The Emergency Management Act provides that a governor's declaration of emergency may last only 28 days, after which "the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature." Mich. Comp. Laws § 30.403(4) (emphasis added).

89. In issuing Executive Order 2020-33, Governor Whitmer invoked only a single emergency—namely, the COVID-19 pandemic—as grounds for exercising her powers under the Emergency Management Act and the Emergency Powers of the Governor Act.

90. The Michigan Legislature did not approve Governor Whitmer's request for an extension of the declaration of emergency beyond April 30, 2020. Accordingly, as a matter of law, the state emergency must be terminated. *See* Mich. Comp. Laws § 30.403. Governor Whitmer terminated the state of emergency and disaster declaration supporting Executive Order 2020-77 on April 30, 2020 by issuing Executive Order 2020-66.

91. That declaration terminated and ended any emergency declaration under the Emergency Powers of the Governor Act and all "orders, rules and regulations" promulgated by the Governor based on that emergency "cease to be in effect" and "no longer exist[]." *See* Mich. Comp. Laws § 10.31(2). Any other interpretation of the Emergency Powers of the Governor Act would not only render the Emergency Management Act entirely superfluous but would also violate the Separation of Powers Clause contained in Michigan's Constitution.

92. Both houses of the Michigan Legislature have not approved an extension of emergency or disaster as declared by the Governor beyond April 30, 2020 and the state of emergency has been terminated by the Governor. Accordingly, Executive Orders 2020-17 and 2020-77 are unenforceable.

93. After terminating the emergency underlying Executive Orders 2020-17 and 2020-77, Governor Whitmer issued an additional two Executive Orders on April 30, 2020, Nos. 2020-67 and 2020-68. Those Orders purport to "continue a statewide emergency and disaster" under the Emergency Powers of the Governor Act and the Emergency Management Act and serve

as the basis to support the Governor's position that her executive orders predicated on the terminated state of emergency remain enforceable.

94. The Orders constitute an attempt to undo and negate the termination of the state of emergency that the Governor was required to end as a matter of law. They have no legal force or effect, and cannot void the termination of the state of emergency foundational to her other Executive Orders. The Governor cannot terminate the emergency as required by law and "unterminate" it or declare it continued in the next breath without running afoul of the law upon which she relied to support her Executive Orders.

95. There is no new emergency. The emergency upon which the Governor's subsequent executive orders rely is exactly the same emergency that Executive Order 2020-66 terminated. The Governor's attempts to circumvent state law cannot be sanctioned, because they not only violate the Separation of Powers clause in the Michigan Constitution, but would also render the statutory language requiring legislative permission for an extension of a proclaimed state of emergency beyond 28 days superfluous. It is well-settled that statutes should be interpreted to be constitutional if such a construction is permitted by the language.

96. The Governor cannot unilaterally extend the states of emergency or disaster in contravention of the state laws that she relies on to justify her executive orders, including Executive Orders 2020-17 and 2020-77. Any contrary interpretation would violate basic principles of separation of powers. It would unlawfully permit the Governor to declare as many emergencies as she wanted, for as long as she wanted, without any legislative checks on the Governor's law making by emergency executive order.

97. Further, to the extent that Mich. Comp. Laws § 10.31 is the basis of the Governor's emergency declaration, it permits the Governor only to issue "reasonable" orders,

rules, and regulations. If applied to prohibit the Plaintiffs' operations, Executive Order 2020-17 and 2020-77 are unreasonable regulations and are not permitted by Mich. Comp. Laws § 10.31(1).

98. The Plaintiffs have been informed by law enforcement and other officials that their operations are prohibited under Executive Orders 2020-17 and 77.

99. Plaintiffs have no adequate remedy at law for this continuing unlawful action by the Defendants.

Count II – Declaratory Judgment
(Violation of Separation of Powers and Non-Delegation Clauses)
Michigan Constitution, Art. III, § 2, and Art. IV, § 1

100. Plaintiffs incorporate all preceding allegations.

101. Executive Orders 2020-17 and 2020-77 are unconstitutional and unenforceable against the Plaintiffs because they are based on impermissible delegations of legislative authority in violation of the Michigan Constitution.

102. The Separation of Powers Clause in the Michigan Constitution provides that "[t]he powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Mich. Const. (1963) art. III, Section 2.

103. Article IV, Section 1 of the Michigan Constitution prohibits the delegation of "legislative power." The essential purpose of this prohibition is to "protect the public from misuses of delegated power." *Blue Cross and Blue Shield of Mich. v. Milliken*, 422 Mich. 1, 51 (1985).

104. A delegation of power through legislation cannot be lawful if it permits executive law making. If a delegation of authority to the executive branch is not sufficiently

specific and/or fails to establish prescribed boundaries, or if the executive branch acts beyond specific boundaries in the legislation, the executive's actions will be constitutionally invalid.

105. Executive Order 2020-17 and 2020-77 are unlawful and unenforceable because the Emergency Powers of the Governor Act, Mich. Comp. Laws § 10.31, violates the Separation of Powers and the non-delegation clauses to the extent that it is interpreted as a delegation to the Governor of total legislative power during a proclaimed emergency for an indefinite period of time.

106. The Emergency Powers of the Governor Act provides no standards to guide or allow a proper delegation of legislative authority to the executive branch. This delegation of authority is completely open-ended; it permits unbridled "law making" by the Governor. The statute has no temporal, durational, substantive, or legislative checks. It gives the Governor carte blanche to regulate and restrict all manner of economic activity, all human interactions, and all movement within the state. A summary of the impermissible law making conducted by Governor Whitmer through executive orders based on this purported grant of statutory authority is attached. (**Exhibit 3**). Accordingly, Governor Whitmer's executive actions predicated on this Act are not enforceable.

107. In the event that the Emergency Powers of the Governor Act does not facially violate the Separation of Powers and non-delegation clauses, Executive Orders 2020-17 and 2020-77 are unlawful and unenforceable because Governor Whitmer has applied any authority granted to her under the Emergency Powers of the Governor Act arbitrarily, unreasonably, and in violation of the Separation of Powers Clause. The Governor has also failed to comport with the terms of the Act.

108. Governor Whitmer explained in an interview on April 27, 2020 her view that "[w]e have to look at this [permitting Michigan businesses to resume operations] as a dial—not a switch, not on and off—but as a dial we can increase or decrease if necessary." Regulating how, when, and what economic activity will be permitted and which Michigan citizens may engage in their rights to earn a living over a lengthy period of time is a legislative function, not an executive one.

109. Executive Order 2020-17 and 2020-77 are also unlawful and unenforceable because the Emergency Management Act, Mich. Comp. Laws § 30.403, violates the Separation of Powers and the non-delegation clauses by giving the Governor total legislative power during a unilaterally-determined emergency for up to 28 days and thereafter with legislative approval.

110. The Emergency Management Act provides no standards to guide or allow a proper delegation of legislative authority to the executive branch; it permits unbridled "law making" by the Governor. This delegation of authority is completely unconstrained. It provides only a temporal check in requiring the Governor to terminate any declared emergency or disaster after 28 days unless both houses of the Michigan Legislature agree to extend the state of emergency or disaster. *See* Mich. Comp. Laws § 30.403(3) & (4). A summary of the impermissible law making conducted by Governor Whitmer through executive orders based on this purported grant of statutory authority is attached. (**Exhibit 3**).

111. Even if the Emergency Management Act does not facially violate the Separation of Powers and non-delegation clauses, Executive Orders 2020-17 and 2020-77 are also unlawful and unenforceable because Governor Whitmer has applied any authority granted to her under the Emergency Management Act arbitrarily, unreasonably, and in violation of the Separation of Power clause. The Governor has also failed to comport with the terms of the Act.

112. Plaintiffs have no adequate remedy at law for this continuing unlawful action by the Defendants.

Count III – Violation of Due Process – Void for Vagueness
U.S. Constitution, Amendment XIV and 42 U.S.C. § 1983;
Michigan Constitution, Article I, § 17

113. Plaintiffs incorporate all preceding allegations.

114. To the extent that Executive Order 2020-17 and 2020-77 are interpreted to bar the Plaintiffs' operations, the Executive Orders are unconstitutionally vague as applied to the Plaintiffs.

115. A basic principle of due process is that an enactment is void for vagueness if its prohibitions are not clearly defined. Executive Order 2020-17 and 2020-77 are unconstitutionally vague because they inappropriately chill protected conduct and invite selective enforcement.

116. Executive Order 2020-17 does not give the Plaintiffs, or any other person of ordinary intelligence, a reasonable opportunity to know what is prohibited and to be able to act in accordance with the directives. The assessment of which medical treatments are deemed essential are largely left to the discretion of healthcare providers, but there are no standards or metrics by which healthcare providers can ensure that their decisions do not expose them to criminal liability.

117. Dr. Khaldun's correspondence underscores that the language of Executive Order 2020-17 is subject to broad interpretation, further undermining the ability of Executive Order 2020-17 to provide reasonably precise guidance to healthcare providers. Due to the criminal penalties imposed by the executive order, these vagueness concerns are heightened.

118. Executive Order 2020-77 does not give the Plaintiffs, or any other person of ordinary intelligence, a reasonable opportunity to know what is prohibited and to be able to act in accordance with the directives. The executive order defines critical infrastructure workers as those "who are necessary to sustain or protect life," which "include *some* workers in each of" a number of business sectors. § 4(a), § 8 (emphasis added). Both facets of the definition are unclear.

119. Executive Order 2020-77 does not provide any explicit standards for determining whether particular operations are or are not engaged in critical infrastructure activity. The executive order does not clarify why certain industries were declared to be critical infrastructure and others were not; instead, it simply references a superseded list provided by CISA, rejects the updated version of the CISA guidance, and adds a handful of other workers deemed critical, such as insurance industry workers, labor union officials, landscapers, and real estate sales workers. The rationale for these decisions—including the decision to allow real estate officials to resume operations but to prohibit other in-person commercial activities—is entirely opaque. Nowhere does Executive Order 2020-77 explain the reason for its differentiation between these industries, explain why it continues to rely on superseded CISA guidance, or explain the standards to be applied by law enforcement officials when determining whether particular business operations fall within particular categories.

120. The office of Michigan's Attorney General has acknowledged that the standards adopted in Executive Order 2020-77 are "difficult . . . to really wrap your arms around." The Attorney General's office has also indicated that it has attempted to clarify the meaning of the order with the Governor's office on an ad hoc basis. Neither the Governor nor the Attorney General has outlined the criteria under which those ad hoc determinations are evaluated.

121. The definition of critical infrastructure workers is not just confusing for the person of ordinary intelligence—it is also confusing for the law enforcement personnel tasked with enforcing the executive order. Law enforcement agencies have been given no explicit standards to aid in their determinations of whether businesses such as the Plaintiffs are operating in accordance with Executive Order 2020-77, which invites arbitrary and discriminatory enforcement.

122. The continually changing FAQs found on the Governor's website do not help. The meaning of the executive order turns on its plain language, not on extra-textual or after-the-fact statements, particularly when those statements change almost daily. The FAQs cannot alter, overcome, or conflict with the plain language in Executive Order 2020-77.

123. Further, the FAQs have morphed over time in ways that cannot be reconciled with the plain text of Executive Order 2020-77.

124. Adding to the confusion, the State's guidance for businesses included in the Attorney General Nessel's official website continues to link to the updated CISA guidance, instead of to the March 19 CISA Guidance. (**Exhibit 12**). As a result, businesses seeking guidance from the Attorney General's office as to whether they perform "critical infrastructure" operations are directed to the updated CISA guidance that Executive Order 2020-77 explicitly rejects.

125. Executive Orders 2020-17 and 2020-77 are impermissibly and unconstitutionally vague as applied to the Plaintiffs.

Count IV – Violation of Due Process – Procedural Due Process
U.S. Constitution, Amendment XIV and 42 U.S.C. § 1983;
Michigan Constitution, Article I, § 17

126. Plaintiffs incorporate all preceding allegations.

127. To the extent that Executive Order 2020-17 or 2020-77 are interpreted to bar the Plaintiffs' operations, the Executive Orders violate the Plaintiffs' procedural due process rights.

128. Even in a pandemic, the Plaintiffs are entitled to the basic protections of due process. *See Friends of DeVito v. Wolf*, ___ A.3d ___, 2020 WL 1847100, at *19-21 (Pa. Apr. 13, 2020). "The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action." *Id*. at *19-20 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963)).

129. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner before one is finally deprived of a property interest.

130. Elimination of the Provider Plaintiffs' ability to engage in business operations deprives the Provider Plaintiffs of a property interest. As such, the Provider Plaintiffs are entitled at minimum to a post-deprivation hearing that provides them with a meaningful opportunity to challenge the designation of their businesses as non-critical infrastructure that must be shuttered in order to control the spread of the pandemic.

131. Executive Order 2020-77 provides no process through which to challenge a business's designation as non-critical infrastructure. Nor does it outline criteria that would serve as a reasonable guide to such a determination. It provides no pre-deprivation or post-deprivation process at all.

132. Executive Order 2020-17 likewise provides no procedure or process through which to challenge the determination that certain medical treatments—such as bariatric surgery or joint replacement—are non-essential.

133. By providing no mechanism through which the Provider Plaintiffs may challenge these determinations or the necessity for shuttering their operations and by failing to identify any criteria that guide the determination of whether certain medical procedures are "essential" or constitute a threat vector for the spread of the COVID-19 pandemic, Executive Orders 2020-17 and 2020-77 violate procedural due process and must be enjoined to prevent further injury and irreparable harm to Plaintiffs.

Count V – Violation of Due Process – Substantive Due Process
U.S. Constitution, Amendment XIV and 42 U.S.C. § 1983;
Michigan Constitution, Article I, § 17

134. Plaintiffs incorporate all preceding allegations.

135. To the extent that Executive Order 2020-17 and 2020-77 are interpreted to bar the Provider Plaintiffs' operations, they violate the Provider Plaintiffs' substantive due process rights.

136. Two fundamental rights are implicated by Executive Order 2020-17 and 2020-77—the right to intrastate travel and the right to practice one's chosen profession. Enactments that directly curtail these fundamental rights are subject to strict scrutiny.

137. To satisfy strict scrutiny, the government must prove that the infringement of the Provider Plaintiffs' rights is narrowly tailored to serve a compelling state interest.

138. While the government can likely show that protection of public health in the face of a global pandemic is an important state interest, after the curve has been flattened, the

facts do not support a finding that this interest is compelling, and the government has made no attempt to narrowly tailor Executive Order 2020-17 or 2020-77 to serve that interest.

139. Executive Order 2020-17 prohibits a variety of medical treatments that are deemed non-essential. However, there has been no showing that providing these medical treatments would increase the risk of transmission of the virus that causes COVID-19 or detract from the protection of public health.

140. Executive Order 2020-77 specifically advises that it "must be construed broadly." And while the Executive Order's stated purpose is to limit person-to-person contact, there has been no demonstration of why the government must prohibit all of the Provider Plaintiffs' operations—including those operations that do not require in-person contact or interaction beyond that which is necessary to provide or obtain medical treatment.

141. Quarantine orders ordinarily require some degree of individualized analysis indicating that the particular individuals and operations quarantined pose an immediate and direct threat of contributing to the spread of an epidemic. The state has performed no analysis of whether the Provider Plaintiffs' operations pose any particular or unique threat of contributing to the spread of the virus that causes COVID-19; nor has there been any analysis of whether Provider Plaintiffs' operations are likely to contribute to the spread of the disease. Without some level of individualized assessment that determines that Provider Plaintiffs or their operations constitute a threat vector for COVID-19, the government cannot demonstrate that prohibiting their operations is narrowly tailored to achieve its public-health goals.

142. Many of the distinctions and requirements imposed by Executive Order 2020-77 also appear to be arbitrary and unrelated to the government's public-health goals. There

has been no demonstration showing why the distinctions and requirements between various industries are necessary in order to achieve the government's public-health purposes.

143. Moreover, Executive Order 2020-77 provides no explanation for the determination to rely upon CISA's superseded March 19 guidance but to reject the updated versions of CISA's guidance. The Executive Order does not outline or apply any criteria that guide the determination of which business operations constitute critical infrastructure; instead, the Executive Order defers to CISA's analysis as to the underlying criteria for making those determinations. Having determined that Michigan will follow CISA's assessments of which industries employ critical infrastructure workers and failing to outline its own criteria for making such determinations, there is no substantive basis for Executive Order 2020-77 to continue to rely upon guidance that CISA has specifically superseded.

144. Because Executive Orders 2020-17 and 2020-77 impinge upon the Plaintiffs' fundamental rights and imposes arbitrary distinctions and prohibitions on the Plaintiffs' conduct, they violate substantive due process as applied to the Plaintiffs.

Count VI – Violation of the Commerce Clause
U.S. Constitution, Art. I, § 8, cl. 3 and 42 U.S.C. § 1983

145. Plaintiffs incorporate all preceding allegations.

146. To the extent that Executive Orders 2020-17 and 2020-77 are interpreted to bar the Provider Plaintiffs' operations, they violate the Commerce Clause of the United States Constitution.

147. Because the Commerce Clause reserves to Congress the power to regulate interstate and foreign commerce, individual states may not unduly regulate commerce.

148. The Provider Plaintiffs' provision of goods and services impact the flow of interstate commerce, such that a regulation of the Provider Plaintiffs' commercial activities is a regulation that impacts interstate commerce.

149. Executive Orders 2020-17 and 2020-77 unduly burden interstate commerce in a manner that is excessive in relation to the alleged benefits of the Executive Orders. The Executive Orders impose enormous burdens on the Provider Plaintiffs' provision of goods and services by prohibiting the Provider Plaintiffs from engaging in their business operations.

150. The burden of this substantial and stringent regulation dwarfs its alleged benefits. Michigan's stated public-health goals are not advanced by prohibiting the Provider Plaintiff's operations because the Provider Plaintiffs can conduct their operations in a manner that complies with the Governor's stated goals of eliminating unsafe person-to-person contact.

151. As applied to the Plaintiffs, the Executive Orders are therefore an undue burden upon interstate commerce in violation of the Commerce Clause.

For the foregoing reasons, the Plaintiffs respectfully request that the Court enter a judgment against the Defendants and award Plaintiffs the following relief:

a. A declaratory judgment that the Provider Plaintiffs are permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to continue their business operations and Mr. Gulick is permitted under Executive Order 2020-17, Executive Order 2020-77, and the HHS order to obtain knee replacement surgery and other vital medical treatment;

b. Alternatively, a declaration that Executive Order 2020-17 and Executive Order 2020-77, as applied to the Plaintiffs, violates the Michigan Constitution, the Fourteenth Amendment, and the Commerce Clause of the United States Constitution;

c. Preliminary and permanent injunctive relief preventing the Defendants from enforcing Executive Order 2020-17, Executive Order 2020-77, and the HHS order against the Plaintiffs;

d. Damages for the violation of the Plaintiffs' constitutional rights, in an amount to be proven at trial;

e. Costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988; and

f. Any further relief that the Court deems appropriate.

MILLER JOHNSON
Co-counsel for Plaintiffs

Dated: May 12, 2020

By /s/ James R. Peterson

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VERIFICATION

I, Randal S. Baker M.D., declare as follows:

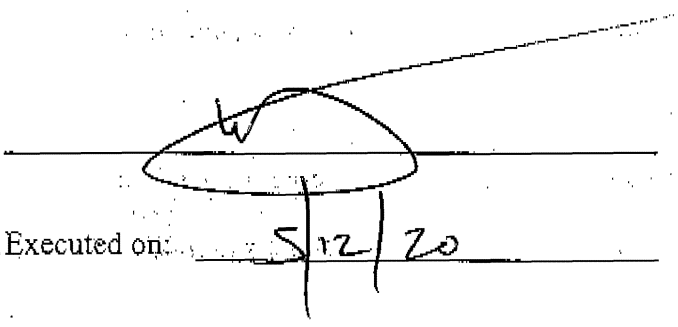
1. I am an adult competent to testify to the matters stated herein;
2. I am the President of Midwest Institute of Health, PLLC, d/b/a Grand Health Partners, and in that capacity, I am familiar with the business of Midwest Institute of Health, PLLC, d/b/a Grand Health Partners, a Plaintiff in this action;
3. I have read the foregoing Verified Complaint and, based upon my personal knowledge of the facts stated therein, the facts stated in the Verified Complaint are true to the best of my knowledge and belief.
4. If called upon to testify, I would competently testify as to the matters stated herein.
5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 5/11/2020

VERIFICATION

I, Jordan Warnshuiz, declare as follows:

1. I am an adult competent to testify to the matters stated herein;
2. I am the owner of Wellston Medical Center, PLLC, and in that capacity, I am familiar with the business of Wellston Medical Center, PLLC, a Plaintiff in this action;
3. I have read the foregoing Verified Complaint and, based upon my personal knowledge of the facts stated therein, the facts stated in the Verified Complaint are true to the best of my knowledge and belief.
4. If called upon to testify, I would competently testify as to the matters stated herein.
5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

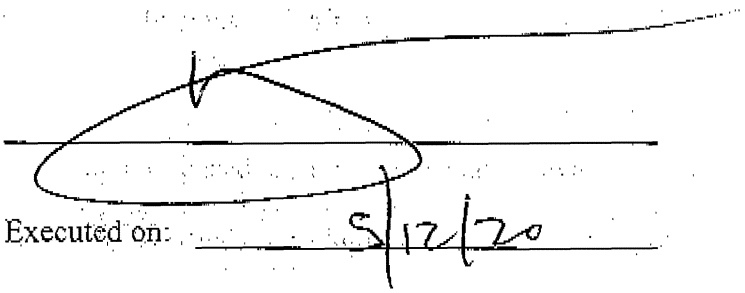


Executed on: 5/12/20

VERIFICATION

I, Jordan Wachholz, declare as follows:

1. I am an adult competent to testify to the matters stated herein;
2. I am the owner of Primary Health Services, PC, and in that capacity, I am familiar with the business of Primary Health Services, PC, a Plaintiff in this action;
3. I have read the foregoing Verified Complaint and, based upon my personal knowledge of the facts stated therein, the facts stated in the Verified Complaint are true to the best of my knowledge and belief.
4. If called upon to testify, I would competently testify as to the matters stated herein.
5. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.



Executed on: 5/12/20

VERIFICATION

I, Jeffery Gulick, declare as follows:

1. I am an adult competent to testify to the matters stated herein;
2. I have read the foregoing Verified Complaint and, based upon my personal knowledge of the facts stated therein, the facts stated in the Verified Complaint are true to the best of my knowledge and belief.
3. If called upon to testify, I would competently testify as to the matters stated herein.
4. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 5/12/2020

EXHIBIT 15

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. BOX 30005
LANSING, MICHIGAN 48909

DANA NESSEL
ATTORNEY GENERAL

May 4, 2020

Re: Executive Orders 2020-69 & 2020-70

Dear Colleagues:

I am writing to clarify that, regardless of what you may have heard, Executive Order 2020-69 (temporary restrictions on the use of places of public accommodation) and Executive Order 2020-70 (temporary requirement to suspend activities that are not necessary to sustain or protect life) are valid and enforceable.

As you are aware, on April 30, 2020, Governor Whitmer issued executive orders under the Emergency Management Act and the Emergency Powers of Governor Act regarding the declared states of disaster and emergency in Michigan. In Executive Order 2020-66, the Governor terminated the states of disaster and emergency that had been previously declared under the EMA, and then, in Executive Order 2020-68, reissued a declaration of states of disaster and emergency under the EMA. A third order, Executive Order 2020-67, reiterated that a state of emergency remains declared under the EPGA.

Subsequently, the Governor issued two orders that have been the subject of debate—Executive Order 2020-69 and Executive Order 2020-70. Executive Order 2020-69 rescinded Executive Order 2020-43, but again placed temporary restrictions on the use of places of public accommodation. Executive Order 2020-70 rescinded Executive Order 2020-59, but again temporarily suspended various activities that are not necessary to sustain or protect life.

After these most recent actions, numerous legislators, and other officials, began to publicly question the validity of the Governor's declarations under the EMA, and consequently, the enforceability of Executive Order 2020-69 and Executive Order 2020-70. Such commentary has created confusion among law enforcement officials tasked with enforcing the orders. In light of this confusion, as the chief law enforcement officer for the State of Michigan, I carefully reviewed the issue and offer the following guidance.

Executive Order 2020-69 and Executive Order 2020-70 were issued by the Governor under *both* the EPGA and the EMA.

The EPGA authorizes the Governor, following the declaration of an emergency, to:

> promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control. [MCL 10.31(1).]

The legislature has deemed this to be a "sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." MCL 10.32. In addition, the provisions of the EPGA are to "be broadly construed to effectuate this purpose." *Id*.

Here, as mentioned, the Governor has declared a state of emergency under the EPGA, and Executive Order 2020-69 and Executive Order 2020-70 were issued following that declaration. Therefore, to be valid under the EPGA, the orders must be "reasonable orders" that the governor "considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1). In promulgating Executive Order 2020-69 and Executive Order 2020-70, the Governor specifically stated that she considered the restrictions imposed by those orders to be "reasonable and necessary" to mitigate the spread of COVID-19 and protect the public health across the State of Michigan. See Executive Order 2020-69, p 1-2; Executive Order 2020-70, p 1-2. I agree with that assessment.

COVID-19 has created a public health crisis of unprecedented gravity in our lifetime. Responding to, and stemming the spread of, the virus is paramount to all our well-being. To date, the most effective means to contain an infectious pandemic is to keep people away from each other. In promulgating Executive Order 2020-69 and Executive Order 2020-70, the Governor has done just that by placing restrictions on certain activities to limit social interactions. The absence of these restrictions would open gateways for the virus to reach every family and social network in every part of the State.

Consequently, the restrictions in Executive Order 2020-69 and Executive Order 2020-70 bear a real and substantial relationship to securing the public health, and they are reasonable. Further, although some restrictions on social interactions have been judiciously loosened by the Governor, the restrictions in Executive Order 2020-69 and Executive Order 2020-70 remain necessary to protect the lives of all Michiganders and bring the emergency created by COVID-19 in Michigan under control. As a result, Executive Order 2020-69 and Executive Order 2020-70 are valid and enforceable under the EPGA. Given that these orders are a valid exercise of the Governor's authority pursuant to the EPGA, the speculation

related to the EMA is of no moment and should not create any confusion as to the enforceability of these orders.

As always, we appreciate your continued assistance in the enforcement of Executive Orders 2020-69 and 2020-70.

Sincerely,

Dana Nessel

Dana Nessel
Attorney General

EXHIBIT 16

MI H.F.A. B. An., H.B. 5496, 1/24/2002

Michigan House Fiscal Agency Legislative Analysis, House Bill 5496

January 24, 2002
Michigan House Fiscal Agency
91st Legislature, 2002 Regular Session

REVISIONS TO EMERGENCY MANAGEMENT ACT

House Bill 5496 (Substitute H-1)

First Analysis (1-24-02)

Sponsor: Rep. Gary A. Newell

Committee: Commerce

THE APPARENT PROBLEM:

Even before the tragic terrorist attacks of September 11, 2001, state emergency planners were working on a revision of the state's Emergency Management Act to address problems and concerns that had arisen with the act since its expansion in 1990. The act is designed to allow the state to deal with so-called disasters and emergencies. It spells out the duties of state and local governments and calls for the creation of emergency management plans at the state and local level. The events of September 11, however, put the dangers of terrorism at the forefront, and concentrated public attention on the need to deal with terrorist threats through the kinds of activities associated with declarations of a "heightened state of alert". A number of provisions related to increased awareness of the threat of terrorism have been added to legislation intended to improve the operations of the state's emergency management system.

THE CONTENT OF THE BILL:

The bill would amend the Emergency Management Act in the following ways.

• The governor would be authorized to declare a "heightened state of alert" when good cause existed to believe that terrorists were in the state or that acts of terrorism might be committed against the state or against a vital resource. Currently, the governor is able under the act to declare a state of disaster or a state of emergency. (See below.)

• The bill would rewrite the provisions regarding immunity for those engaged in disaster relief in order to provide employees, agents, or representatives of the state or a political subdivision of the state, nongovernmental disaster relief force workers, and private or volunteer personnel engaged in disaster relief immunity from tort liability to the same extent as provided under the Governmental Immunity Act. (See below.)

• The director of each department of state government, and of any agency required by the state emergency management plan to provide an annex to that plan, would serve as emergency management coordinator for his or her respective department or agency. Currently, the act requires the directors to employ or appoint a coordinator. Instead, the bill would allow each director to appoint or employ a designated representative as emergency management coordinator, provided that the representative acted for and at the direction of the director while acting as coordinator upon the activation of the state emergency operations center or the declaration of a state of disaster or emergency.

• The bill would specify that for the purpose of states of disaster or emergency, the judicial branch of state government would be considered a department of state government and the chief justice would be considered the director of the department.

• The bill would require a public college or university with a combined average population of faculty, students, and staff of 25,000 or more, including its satellite campuses, to appoint an emergency management coordinator. Public colleges and universities with a combined average population of 10,000 or more could (but would not be required to) appoint a coordinator.

The act currently requires a county board of commissioners to appoint an emergency management coordinator (although up to three adjoining counties can combine to do this); requires a municipality with a population of 25,000 or more to appoint an emergency management coordinator or appoint the county coordinator to serve in this role; allows a municipality of 10,000 or more to appoint its own coordinator; and allows a municipality of less than 10,000 to appoint a coordinator who would serve at the direction of the county coordinator. The act further allows a county coordinator to be appointed coordinator for any municipality within the county and allows a municipal coordinator to be appointed county coordinator.

- Currently, a state of disaster or state of emergency stays in effect for 14 days, and then the governor must declare it terminated or seek an extension for a specific number of days, which must be approved by the legislature. The bill would extend the time periods for a state of disaster or emergency to 28 days rather than 14 days. It also would specifically require any extension to be approved by resolution of both houses of the legislature.
- The bill would provide that if the governor had issued a proclamation, executive order, or directive related to a state of disaster or a state of emergency, the director of the Department of State Police could, with the concurrence of the governor, amend the proclamation or directive by adding counties or municipalities or terminating the orders and restrictions as considered necessary.
- The Division of Emergency Management within the Department of State Police would be authorized, in addition to its other powers, to propose and administer statewide mutual aid compacts and agreements.
- The bill would specifically include mitigation, preparedness, response, and recovery among the emergency management activities to be included in emergency management plans and updates of those plans, and would require that emergency management plans and programs include local courts.
- Currently, the act allows municipalities and counties to enter into mutual aid or reciprocal aid agreements or compacts with other counties, municipalities, public agencies, and private sector agencies. The bill would add federally recognized tribal nations. The compacts are limited to the exchange of personnel, equipment, and other resources in times of emergency or disaster. The bill would allow the compacts in cases of other serious threats to public health and safety.
- Section 15 of the act, which created the Michigan Emergency Management Advisory Council, would be repealed. (This council had previously been eliminated by executive order in 1993.)

Heightened State of Alert. If a good cause existed to believe that terrorists were in the state or that acts of terrorism could be committed in the state or against a vital resource, the governor could by executive order or proclamation declare a heightened state of alert and subsequently exercise the same authority as for a state of disaster or state of emergency in an effort to safeguard the interests of the state or a vital resource, prevent or respond to acts of terrorism, or to help apprehend terrorists and those acting in concert with them. The governor could use the services, facilities, and resources available under a declared state of emergency or disaster. The heightened state of alert would continue until the governor found that the threat or danger had passed, the state of alert had been dealt with so that the conditions no longer existed, or until it had been in effect for 60 days. After 60 days, the governor would have to terminate the state of alert unless a request for an extension for a specific number of days was approved by resolution of both houses of the legislature.

It would be a misdemeanor for a person to willfully disobey or interfere with the implementation of a rule, order, or directive issued by the governor related to a heightened state of alert. The misdemeanor would be punishable by imprisonment for not more than 90 days or a fine of not more than $100 or both. The attorney general or a prosecuting attorney could bring a civil action for damages or equitable relief to enforce the provisions of the act and the orders, rules, or regulations made in conformity with the act.

Immunity in Disaster Relief. Under the bill, the state or a political subdivision of the state engaged in disaster relief activity would not be liable for the death of or injury to a person or persons, or for damage to property, as a result of that activity. The employees, agents, or representatives of the state or a political subdivision, and nongovernmental disaster relief force workers or private or volunteer personnel engaged in disaster relief activity, would be immune from tort liability under Section 7 of the Governmental Immunity Act. (Generally speaking, that act provides immunity except when the conduct of the officer, employee, member, or volunteer amounts to gross negligence that is the proximate cause of the injury or damage.) The term "disaster relief activity" would include training for or responding to an actual, impending, mock, or practice disaster or emergency.

(This provision would replace the current immunity language in the act, which states that, except in cases of willful misconduct, gross negligence, or bad faith, employees, agents, or representatives of the state or a political subdivision, or any volunteer or auxiliary disaster relief worker or member of any agency engaged in disaster relief activity, complying with or reasonably attempting to comply with the act, or any order, promulgated rule, ordinance enacted by a political subdivisions relating to any precautionary measures, would not be liable for the death of or injury to persons, or for damage to property, as a result of that activity.)

Also, current language in the act applying exclusively to volunteer disaster relief workers or members of agencies engaged in disaster relief activity would be deleted. Instead the bill would say the state, any political subdivision of the state, or the employees, agents, or representatives of the state or a political subdivision would not be liable for personal injury or property damage by any person appointed or acting as a member of disaster relief forces.

MCL 30.403 et al.

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the bill would have no apparent substantial fiscal impact, although there could be some administrative costs associated with new responsibilities for state and local governments and for public universities. The agency also points out that to the extent that new penalties were applied, local correctional costs would increase and fine revenue earmarked for local libraries would increase. (HFA fiscal note dated 1-15-02)

ARGUMENTS:

For:

The bill would make a number of changes to the state's emergency management system in recognition of increased concerns about terrorism and to address problems and concerns that have arisen in administering the Emergency Management Act since its most recent revision in 1990. The bill is considered to be a component in the multi-bill legislative package on terrorism introduced since the terrorist attacks of September 11. Among the improvements to current law are the following.

• In recognition of the need to make the emergency system operative when officials believe the threat of terrorism is imminent, the governor would be authorized to declare a "heightened state of alert", which could stay in effect for as long as 60 days. This would allow the governor and the emergency system to take precautions to protect the public and the state's critical infrastructure in advance of actual emergency or disaster. The governor would have the same powers and could use the same resources, facilities, and services, as are currently available under a state of emergency or state of disaster, in order to safeguard the state's interests and vital resources, prevent or respond to acts of terrorism, and apprehend terrorists. The state of alert could only be extended beyond 60 days with the approval, by resolution, of both houses of the state legislature.

• The bill would provide the same immunity from tort liability to disaster relief workers as now exists for officers, employees, members, and volunteers of governmental agencies under the Governmental Immunity Act.

• Currently, a state of emergency or disaster can stay in effect for only 14 days and then requires extension by the legislature. The bill would extend that time period to 28 days and would specifically require that both houses of the legislature pass a resolution in order to extend the time period. This recognizes that sometimes the legislature may not be in session during the time when a state of emergency or disaster needs extending. The longer time period makes this less likely. The act currently provides no specific procedure for the legislature to use in extending a time period; the bill makes it a clear that this must be done by resolution.

• The bill would bring both the courts, under the direction of the Michigan Supreme Court, and large public universities into the emergency management system, to make sure that there is proper coordination. As a result, universities would be treated much like municipalities are currently treated, with the largest required to appoint emergency management coordinators, and the judicial branch would be treated like a state department (with the chief justice of the state supreme court treated like a department head). State emergency officials say that the courts want to be involved in emergency planning and that local units often consider universities to be state agencies and may not include them in local emergency planning. While universities likely

already engage in emergency and disaster planning, it is important that this be done within the overall emergency planning system, so that different entities are not working at cross purposes.

• Recently, Michigan joined an interstate compact that allows participating states to provide mutual assistance in case of emergencies and disasters, and the current state emergency law allows local units to enter into similar compacts. The bill, however, would specifically permit the Emergency Management Division of the Department of State Police to organize and administer statewide mutual aid compacts and agreements. Cooperation between state and local agencies is important in providing comprehensive and appropriately aligned emergency management services.

• Department directors would be the emergency management coordinators for their departments. They then could appoint a designated representative to carry out the duties of that office. Currently, each department simply must appoint an emergency management coordinator to act as a liaison to the Department of State Police's emergency management division. The bill would ensure that there was a direct link between a department director and the duties of the department's office of emergency management coordinator and would eliminate any intermediate lines of authority. In times of emergencies, disasters, and states of alert, it is important that each department's coordinator act directly for and at the direction of the department director rather than having to go through a more complicated chain of command.

Against:

Some people have expressed misgivings about expanding the power of state agencies in the name of fighting terrorism or dealing with emergencies. This bill, for example, allows a heightened state of alert to remain in place for 60 days at the direction of the governor. That is a considerable length of time for the state government to be able to exercise emergency powers. While the legislature is given a role in extending such a state of alert, there is no provision allowing the legislature to shorten a state of alert or to override a governor's declaration. This might be a useful protection against abuses of executive power. (Moreover, the maximum duration, without legislative approval, of a state of emergency or a state of disaster would be increased from 14 days to 28 days. Similar concerns have been expressed about this.) In disasters, emergencies, and (with this bill) heightened states of alert, the government can suspend statutes and rules, control where people can travel, remove people from their homes and businesses, suspend the sale of alcohol and firearms, and engage in a variety of other activities. Questions have also been raised about the penalties that would be imposed during heightened states of alert for willfully disobeying or interfering with the implementation of a rule, order, or directive issued by the governor. Additionally, there are concerns about the impact of new requirements on public universities and questions about whether they have been consulted about these new requirements.

Response:

It is expected that a variety of concerns and issues will be addressed as the bill moves through the legislative process. It should be noted that the penalties in the bill relating to heightened states of alert are consistent with those currently in the act for states of emergency and disaster.

POSITIONS:

Representatives of the Department of State Police testified in support of the bill. (1-22-02)

Analyst: C. Couch

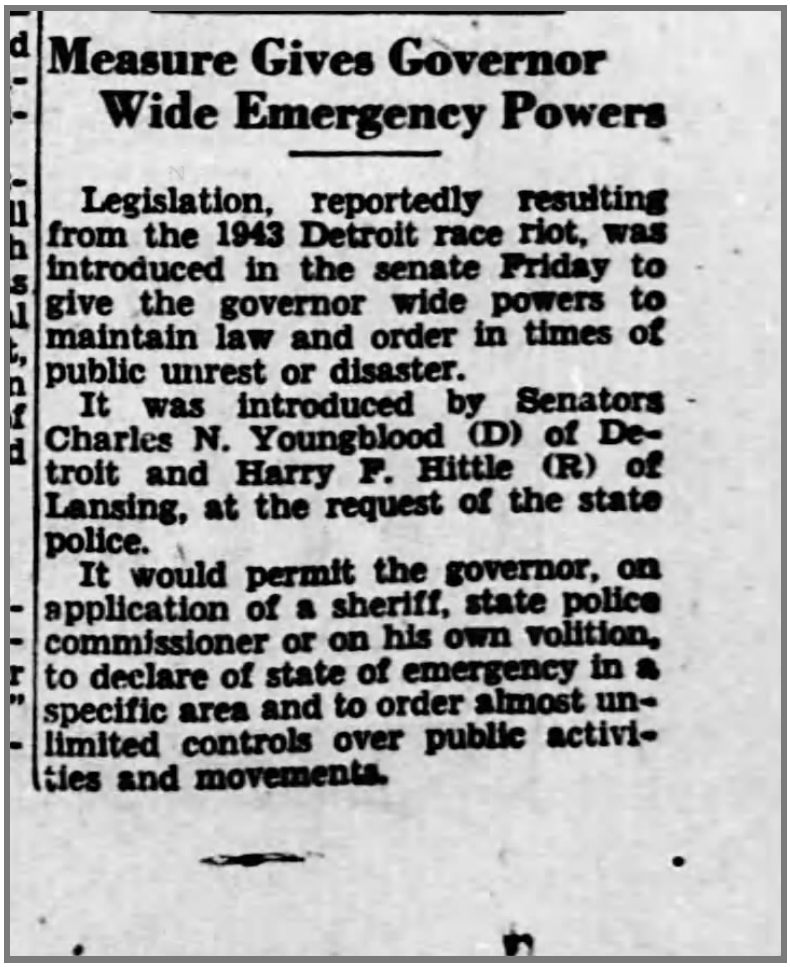
This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

MI H.F.A. B. An., H.B. 5496, 1/24/2002

End of Document

EXHIBIT 17

Lansing State Journal (Lansing, Michigan) · 6 Apr 1945, Fri · Page 1



Measure Gives Governor Wide Emergency Powers

Legislation, reportedly resulting from the 1943 Detroit race riot, was introduced in the senate Friday to give the governor wide powers to maintain law and order in times of public unrest or disaster.

It was introduced by Senators Charles N. Youngblood (D) of Detroit and Harry F. Hittle (R) of Lansing, at the request of the state police.

It would permit the governor, on application of a sheriff, state police commissioner or on his own volition, to declare of state of emergency in a specific area and to order almost unlimited controls over public activities and movements.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, et al., Plaintiffs,	)	No. 1:20-cv-414
-v-	)	Honorable Paul L. Maloney
GRETCHEN WHITMER, et al., Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION

This matter is before the Court on Defendants' motion for reconsideration (ECF No. 38). Plaintiffs oppose the motion (ECF No. 40). For the reasons to be explained, the Court will deny the motion.

A motion for reconsideration may be granted when the moving party demonstrates a "palpable defect" by which the Court and parties have been misled and a showing that a different disposition of the case must result from the correction of the mistake. W.D. Mich. LCivR 7.4(a). The decision to grant or deny a motion for reconsideration under this Local Rule is within the district court's discretion. *See Evanston Ins. Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 691 (6th Cir. 2012) (citation omitted).

A motion for reconsideration is not an opportunity to present new arguments that could have been presented before the court issued its ruling, but an opportunity for the court to reconsider those arguments already presented. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); *see also Evanston Ins.*, 683 F.3d at 692 (reviewing the district court's application of the palpable defect standard and upholding the

denial of the motion for reconsideration because the arguments advanced in the motion were not raised during the prior proceedings). Nor is a motion for reconsideration a second opportunity for a party to present "new explanations, legal theories, or proofs." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001). This rule can only be overlooked "in exceptional cases," or when the rule would produce a "plain miscarriage of justice." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)).

Despite submitting briefs and presenting oral argument on the issue of whether to certify questions to the Michigan Supreme Court, no Defendant has raised the issue of Eleventh Amendment immunity as a bar to certification until the present motion for reconsideration. Thus, the Court would normally not consider the issue: the time to raise this argument has passed. *See Evanston Ins.*, 683 F.3d at 692; *Jinks*, 250 F.3d at 385.

However, the Court recognizes that "Eleventh Amendment issues are jurisdictional in nature." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1046 (6th Cir. 2015). Once the Eleventh Amendment has been raised as a jurisdictional defect, the Court must address the issue before moving to the merits of the case. *Id.* Accordingly, the motion for reconsideration presents an "exceptional case" such that the Court will consider it on the motion for reconsideration. *See Scottsdale Ins.*, 513 F.3d at 552.

"The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001). Suits brought against state officials in their official capacity are equivalent to suits against the state itself. *See Kentucky v. Graham*, 473

U.S. 159, 166 (1985); *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009). Plaintiffs bring this case against Defendants solely in their official capacities, so the Defendants may be sheltered from suit by the Eleventh Amendment.

The Eleventh Amendment provides broad constitutional immunity to state actors, but the Supreme Court has long recognized an exception for forward-looking injunctive relief: federal courts may enjoin state officials from the future enforcement of state legislation that violates federal law. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). However, the "purposes of *Ex parte Young* do not apply to a lawsuit designed to bring a State into compliance with *state law*." *Ernst v. Rising*, 427 F.3d 351, 368 (2005); *see also Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106. It follows that state officials enjoy Eleventh Amendment immunity for all lawsuits that bring state-law claims against state officials in federal court, whether the claims are monetary or injunctive in nature. *Id*; *see also Freeman v. Michigan Department of State*, 808 F.2d 1174, 1179 (6th Cir. 1987).

Plaintiffs do seek prospective injunctive relief: they wish to enjoin Defendants from enforcing the "Stay at Home" executive orders that are still in place in Michigan. But they do so, in part, by requesting that this Court bring Defendants in line with Michigan law, not federal law. In Count I, Plaintiffs request a declaration that all executive orders Governor Whitmer has issued since April 30, 2020 are unlawful exercises of authority under state law. In Count II, Plaintiffs request a declaration that all executive orders Governor Whitmer has issued regarding the pandemic, regardless of timing, are unlawful because she has justified them with two state laws that are unconstitutional delegations of legislative authority under the Michigan constitution. In these two Counts, Plaintiffs seek to bring Defendants in line

with Michigan law and the Michigan constitution. Plaintiffs have brought two state-law claims against state officials in federal court. Accordingly, Defendants may be entitled to Eleventh Amendment immunity on Counts I and II.

But the Eleventh Amendment does simply not provide an exit ticket on Defendants, to be shown at any time during litigation. States may waive their Eleventh Amendment immunity by their conduct in federal court. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 618 (2002). The waiver doctrine prevents states from selectively invoking immunity "to achieve unfair tactical advantages." *Id.* at 621. Evaluating whether the state has waived its Eleventh Amendment immunity is a case-specific analysis, focused on the whole of the state's conduct in the litigation.

The Sixth Circuit has held that Eleventh Immunity was waived when the state "engaged in extensive discovery and then invited the district court to enter judgment on the merits. It was only after judgment was adverse to the State that it revealed that it had its fingers crossed behind its metaphorical back the whole time." *Ku v. State of Tennessee*, 322 F.3d 431, 435 (6th Cir. 2003). That conduct – appearing without objection and defending the case on the merits – was sufficient to waive the state's defense of Eleventh Amendment immunity, and Tennessee could not raise it post-judgment. *Id.* Similarly, the Ninth Circuit has held that Eleventh Amendment immunity is waived where a state files an answer, moves for summary judgment, presents oral argument on the merits of the case, hears the Court's preliminary (adverse) findings, and then moves to dismiss on immunity grounds. *In re Bliemeister*, 296 F.3d 858, 862 (9th Cir. 2002). Again, that conduct was "clearly a tactical decision," and allowing the state "to assert sovereign immunity after listening to a court's substantive

comments on the merits of a case would give the state an unfair advantage when litigating suits." *Id.*

While the Court appreciates that this case is barely a month old, Defendants' statements and actions evidence an intent to waive their Eleventh Amendment immunity. In the face of Plaintiffs' motion for a preliminary injunction, the Defendants filed a combined 107 pages of briefing. Defendants Whitmer and Gordon raised multiple abstention doctrines, but in the alternative, presented arguments on the merits of Counts I and II (*See* ECF No. 20 at § III.B). There is no mention of Eleventh Amendment immunity. Defendant Nessel argued that the case was moot, but in the alternative, addressed the merits of Counts I and II (*See* ECF No. 15 at § I.B.1). She makes no mention of Eleventh Amendment immunity.

In early June, the Defendants filed lengthy motions to dismiss. Again, Defendants Whitmer and Gordon make multiple arguments that this Court should not adjudicate the case, including abstention, ripeness, mootness, standing, and issues with supplemental jurisdiction (ECF No. 35-1). However, this motion contains only a passing reference to the Eleventh Amendment to state that Plaintiffs are not entitled to money damages (*Id.* at § I.A). And again, the motion makes arguments on the merits of Counts I and II (*Id.* at § III.A). Defendant Nessel presents a similar motion to dismiss, arguing that there are several reasons why this Court should not adjudicate the case, but like the other Defendants, makes only a passing reference to the Eleventh Amendment as it relates to money damages (ECF No. 27 at § IV.B).

At the Court's invitation, all parties filed briefs regarding the certification of issues of state law to the Michigan Supreme Court. In their opposition to certification, Defendants Whitmer and Gordon argued that the case was moot or non-justiciable but did so without invoking the Eleventh Amendment (ECF No. 33). Similarly, Defendant Nessel argued that the case was moot, or that the case should be held in abeyance, but did not invoke Eleventh Amendment immunity (ECF No. 34). When the Court heard argument on the certification issue, Defendants appeared without objection. They made several arguments against certification and offered several options to the Court: dismiss Counts I and II with prejudice because they were moot, not yet ripe, or Plaintiffs lacked standing; dismiss Counts I and II without prejudice to allow Plaintiffs to file those claims in Michigan Courts; hold Counts I and II in abeyance pending resolution of the issues in the Michigan Courts; or hold the entire case in abeyance pending the same. At no time during the hearing did any Defendant claim they were entitled to Eleventh Amendment immunity on Counts I and II. At the close of the hearing, the Court indicated that it would certify the questions presented in Counts I and II to the Michigan Supreme Court and that a written opinion would issue. The following day, Defendants brought this motion for reconsideration, raising Eleventh Amendment immunity for the first time.

As in *Ku* and *Bliemester*, the Defendants have waited until after they received an unfavorable decision from the Court to raise the Eleventh Amendment as a defense. By the Court's count, the Defendants have put forth at least seven different arguments as to why this Court does not have jurisdiction over, or should not exercise its jurisdiction to hear, Counts I and II. Defendants have also repeatedly put forth alternative arguments on the merits of

Counts I and II. And perhaps most telling, Defendants have repeatedly asked this Court to postpone the exercise of its jurisdiction over Counts I and II until the Michigan Courts can resolve the question. At that point, they say, the Court can proceed to adjudicate this case. But when the Court attempted to do just that by certifying questions of law to the Michigan Supreme Court, Defendants suddenly invoked Eleventh Amendment Immunity.

Unlike *Ku* and *Bliemester*, this case has not lingered on the Court's docket for months, nor has it proceeded through discovery or extensive motion practice. However, given the rapidly changing circumstances that underpin this case, as well as the gravity of the issues presented, the case has progressed quickly and voluminously.[1]

Given the totality of the circumstances, the Court finds that Defendants have waived their Eleventh Amendment immunity. Despite filing multiple briefs urging the Court not to hear Counts I and II, Defendants did not assert the Eleventh Amendment until after receiving an apparently unfavorable decision on June 10, 2020. At that point, they decided they wanted out and invoked the Eleventh Amendment. Defendants selectively, belatedly invoked Eleventh Amendment immunity to "achieve unfair tactical advantages." *Lapides*, 535 U.S. at 621. Therefore, the Court finds that defendants have waived their Eleventh Amendment immunity. Accordingly,

[1] In 30 days, the parties have filed over 2,000 pages of briefing and exhibits.

IT IS HEREBY ORDERED that Defendants' motion for reconsideration (ECF No. 38) is **DENIED**.

IT IS SO ORDERED.

Date: June 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MIDWEST INSTITUTE OF HEALTH, PLLC, d/b/a GRAND HEALTH PARTNERS, et al., Plaintiffs,	)	No. 1:20-cv-414
-v-	)	Honorable Paul L. Maloney
GRETCHEN WHITMER, et al., Defendants.	)	

OPINION

This case presents extremely important issues of Michigan state law. The issues presented here, however, have never been considered by the Michigan Court of Appeals or the Michigan Supreme Court. This Court notified the parties that it was considering certifying two questions to the Michigan Supreme Court on May 28, 2020 (*See* ECF No. 23). The Court held a hearing on June 10, 2020 and heard argument on the issue. For the reasons to be explained, the Court will certify the following questions to the Michigan Supreme Court:

1. Whether, under the Emergency Powers of the Governor Act, MCL § 10.31, *et seq.*, or the Emergency Management Act, MCL § 30.401, *et seq.*, Governor Whitmer has the authority after April 30, 2020 to issue or renew any executive orders related to the COVID-19 pandemic.

2. Whether the Emergency Powers of the Governor Act and/or the Emergency Management Act violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

As a preliminary matter, Defendants argue that certification is not proper at this juncture because Plaintiffs' claims are completely moot. The Court disagrees. Certainly, the primary relief Plaintiffs requested – the repeal of EO 2020-17 – has occurred. However, the

remainder of the relief Plaintiffs request may still be granted to them. Throughout the complaint, Plaintiffs challenge the "Stay at Home" orders issued by Governor Whitmer.[1] In Count I, Plaintiffs allege that the Stay at Home orders are unlawful exercises of authority under state law; in Count II, Plaintiffs allege that the Stay at Home orders are unenforceable because they are based on impermissible delegations of legislative authority. Thus, the question of the Stay at Home orders' legality lingers as long as the Stay at Home orders remain in place.

Moreover, while Plaintiffs have been allowed to reopen their healthcare businesses to some degree, EO 2020-114 places 15 new workplace safety requirements on healthcare facilities, including limiting the number of appointments Plaintiffs can schedule daily. While Plaintiffs did volunteer to put in place some protective practices (*see, e.g.*, Complaint at ¶ 32), they did not volunteer to operate at a limited capacity. The Governor is still placing restrictions on Plaintiffs and as above, the Plaintiffs have challenged the validity of the executive orders propagating those restrictions. Given the continued restrictions on Plaintiffs' ability to operate and the ongoing challenge to the validity of the Stay at Home executive orders, the Court finds that the case is not moot at this time.

The process of certification is governed by two court rules: Local Civil Rule 83.1 and Michigan Court Rule 7.208. Local Civil Rule 83.1 provides:

> Certification of issues to state courts - Upon motion or after a hearing ordered by the judge sua sponte, the court may certify an issue for decision to the highest court of the state whose law governs any issue, claim or defense in the case. An order of certification shall be accompanied by written findings that: (a) the issue certified is an unsettled issue of state law; (b) the issue certified will

[1] At the time the Complaint was filed, Plaintiffs challenged EO 2020-77. That order has since been rescinded and replaced multiple times. At the time of writing, the operative "Stay at Home" order is EO 2020-115.

> likely affect the outcome of the federal suit; and (c) certification of the issue will not cause undue delay or prejudice. The order shall also include citation to authority authorizing the state court involved to resolve certified questions. In all such cases, the order of certification shall stay federal proceedings for a fixed time, which shall be subsequently enlarged only upon a showing that such additional time is required to obtain a state court decision. In cases certified to the Michigan Supreme Court, in addition to the findings required by this rule, the court must approve a statement of facts to be transmitted to the Michigan Supreme Court by the parties as an appendix to briefs filed therein.

W.D. Mich. L. Civ. R. 83.1. The relevant portion of the Michigan Court Rule provides:

> (a) When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.
> (b) A certificate may be prepared by stipulation or at the certifying court's direction, and must contain
> (i) the case title;
> (ii) a factual statement; and
> (iii) the question to be answered.
> The presiding judge must sign it, and the clerk of the federal, other state, or tribal court must certify it.

M.C.R. 7.308(A)(2).

Certifying an issue to a state supreme court is appropriate "when the question is new and state law is unsettled." *Sherwood v. Tennessee Valley Authority*, 925 F. Supp. 2d 906, 916 (quoting *Pennington v. State Farm Mutual Auto. Ins. Co.*, 553 F.3d 447, 449-50 (6th Cir. 2009)). Moreover, submitting uncertain questions of state law to a state's highest court "acknowledges that court's status as the final arbiter on matters of state law and avoids the potential for 'friction-generating error' which exists whenever a federal court construes a state law in the absence of any direction from the state courts." *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir, 2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

In the Court's judgment, the three requirements for certification set out in Local Rule 83.1 are met. The parties do not dispute that the issues to be certified are unsettled questions of state law, nor does any party argue that certification would cause undue delay or prejudice. The parties disagree about whether the issues to be certified will likely affect the outcome of this suit.

The issues to be certified are, essentially, Counts I and II of the complaint. The parties acknowledge that if Plaintiffs do succeed on either Count I or Count II, the Court need not evaluate the remainder of Plaintiffs' claims (which are all constitutional claims). Defendants Whitmer and Gordon argue that it is unlikely that the case will be completely resolved on the state law issues, because for Plaintiffs to succeed on Counts I and II, a Court would have to find that Governor Whitmer's COVID-19 related executive orders issued since April 30, 2020 violate the EPA, the EPGA, *and* the Michigan Constitution. In these Defendants' eyes, the likelihood of Plaintiffs winning on all three grounds is slim, so the Court will eventually be required to address the federal constitutional claims anyway.

What these Defendants have failed to consider is the doctrine of constitutional avoidance. The Court is required to consider issues of state law that may resolve a case before reaching questions of constitutional law because the Court must avoid evaluating purely hypothetical constitutional questions. *See Torres v. Precision Industries, Inc.*, 938 F.3d 752, 756-57 (6th Cir. 2019). Put differently, even if Plaintiffs' chance of succeeding on Count I or Count II is slim, a victory on either count would relieve the Court from evaluating the remainder of the complaint and the constitutional claims presented therein. This requires the Court to consider the questions presented in Count I and Count II before reaching any

other claims. Put differently, the state law issues are not only likely to affect the outcome of the suit; they are certainly going to affect the outcome because they must be decided before an outcome will be reached.

Having determined that this Court must interpret Michigan statutes that have never before been interpreted by the Michigan Courts, the Court is guided by the Supreme Court's instruction to employ certification. If the "unconstrued state statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem,' " the Supreme Court has held that district courts should utilize the certification process. *Bellotti v. Baird*, 428 U.S. 132, 146-47 (1976) (quoting *Harrison v. NAACP*, 360 U.S. 167, 177 (1959)). Therefore, the Court finds that certification is appropriate and that all three requirements for certification set out in the Local Rule are met.

Finally, the Court emphasizes the considerations of comity and federalism, which caution federal courts from "needlessly addressing questions of state law and deciding state-law issues of first impression." *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp 2d 878, 895 (W.D. Mich. 2001). The "last word" on interpretations of state law belongs with the State Supreme Court, not the federal district court. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499-500 (1941). Thus, rather than interpret a novel question of state law for the first time – particularly a question of state law that might affect every citizen in the state of Michigan – this Court turns to the ultimate authority on what Michigan law is: the Michigan Supreme Court. Additionally, the guidance sought today prevents this Court from overstepping its role, eliminates the risk that this Court interprets the relevant state law

differently than the Michigan Supreme Court might, and eliminates the risk of conflicting federal and state decisions.

In sum: this case has not been rendered moot. The factors for certification set out in Local Rule 83.1 are met. And the principle of federalism virtually requires this Court to certify these questions to the Michigan Supreme Court. Therefore, the Court will enter an order certifying the two identified questions of law to the Michigan Supreme Court and hold this case in abeyance until that court reaches a decision on the matter.

An order will be entered consistent with this opinion.

IT IS SO ORDERED.

Date: June 16, 2020

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

1. Holding unimproved land indefinitely adjacent to land now used by the corporation and preventing its development by others.

2. This provision had been in the constitution for over 50 years and it should be retained until such time as it can be shown that corporations suffer losses therefrom.

I think, on the basis of our experience, we have seen corporations show losses.

I would like to quote very briefly just a few more statements from Mr. Don Weeks, because I think it reflects the business attitude toward section 5.

As a result, Michigan's economy is handicapped in competition with other states. The Detroit board of commerce adopted the report of its legislative committee of October 3, 1961 which states that many million dollars of financing have been lost to Michigan because of this section in Michigan's constitution.

The industrial development advisory committee of the Michigan economic development commission, at its meeting on December 28, 1951, stated, "It is obvious that we are at a disadvantage with respect to other states on this question of long term investments by insurance companies."

This is confirmed by managers of mortgage loan and real estate investment branches of large insurance companies. They state that their investment activities in this state would increase materially if article XII, section 5, were deleted from the constitution.

Therefore, on the basis of our legal authority, on the basis of our business people, we thought we could help improve Michigan's economic climate by recommending to this convention the deletion of section 5.

CHAIRMAN HUTCHINSON: Mr. Woolfenden.

MR. WOOLFENDEN: For a discussion of the reasons behind the unanimous committee recommendation for the deletion of sections 6, 7 and 8, I yield to Delegate Mahinske.

CHAIRMAN HUTCHINSON: Mr. Woolfenden yields to Mr. Mahinske.

MR. MAHINSKE: With reference to section 6 in the existing constitution, you will note that the rule is laid down that the legislature shall pass no law renewing or extending any special act of incorporation heretofore granted. Now, the original appearance of this item in the constitution goes back to section 8, article XV of the 1850 constitution for the reason that at this time, 1850, for the first time the state of Michigan required incorporation by general law only. This provision was put in as a saving clause to any incorporated bodies we had at that time that were incorporated under special acts of the legislature. It appears from our investigation in this area that probably in 1908 this provision was not necessary, but for one reason or another it was inserted. The general opinion of the committee at this time is that there are none of these corporations in existence, and if there are, the exclusion of section 6 would not jeopardize them at all.

Going on to section 7, which is entitled Passenger Fares and Freight Rates, it was concluded by the committee when we went over this section that the section is also obsolete. It has been determined by court cases and otherwise that the legislature does not need constitutional authority in order to delegate rate fixing power to a railroad commission, which we have in this state, and it no longer serves as a source of the legislature's power to fix rates. Also we have determined that the legislature has the inherent power to regulate public utilities and common carriers, and for these reasons we feel this section is no longer needed. There are other provisions in the constitution permitting the establishment of such bodies as the Michigan public service commission and so forth which we have in existence now that handles this area.

Section 8, we feel, is in absolute conflict with the federal laws in the area; section 8 being entitled Consolidation of Railroads. This area of section 8 is taken care of by the interstate commerce commission, by the federal government. Federal laws have been set up, and there is even federal constitutional authority giving jurisdiction in this area to the federal body. For these particular reasons the committee feels this is an obsolete section and there is no point in retaining it in the constitution.

CHAIRMAN HUTCHINSON: Mr. Woolfenden.

MR. WOOLFENDEN: For the reasons which have been submitted to the convention, we recommend that this exclusion report be adopted. Support for the committee's recommendation is found in the action of other constitutional conventions in connection with the 3 most recently adopted state constitutions, and I refer to the constitutions of Alaska, Hawaii and the Connecticut revised constitution. In none of those constitutions is there any corporation article, and the model state constitution published by the national municipal league also contains no corporation article.

I would like to supplement what Delegate Mahinske has said with respect to special charters. There are probably some special charters still in existence. However, neither by the recommended deletion of section 3 or section 6 will any organization which does have a special charter antedating 1908 be adversely affected. We have been into that question with Dr. Conard and with the counsel for these organizations that we mentioned, and we are satisfied that the legislation — the special legislation — creating those charters is not affected in any way by this proposed deletion. Therefore, Mr. Chairman, we recommend that these sections 1, 2, 3, 5, 6, 7 and 8 of article XII be excluded from the new constitution.

CHAIRMAN HUTCHINSON: Mr. Woolfenden yields the floor.

The Chair recognizes Mr. Hatch.

MR. HATCH: Mr. Chairman, I would like to direct a question to Mr. Binkowski in connection with section 5. It seems to me that the reasons which Mr. Binkowski has given are most laudable, but I wonder whether the committee has considered the possibility of something other than a bona fide corporation organized for profit; in other words, a corporation organized by a given individual for the sole purpose of maintaining title to the land in that corporation indefinitely. What I am getting at is whether the committee considered the possibility of elimination of this provision in some way affecting the rule against perpetuities; in other words, tying up land.

CHAIRMAN HUTCHINSON: Mr. Binkowski.

MR. BINKOWSKI: Mr. Hatch, I think that on the basis of our study, and on the basis of what we have been reading, we feel that the supreme court has rendered this section of the constitution a dead letter, and that it is of no force and effect. I think on that basis the committee did not feel that a corporation would be in any better position, so to speak, to violate the law against perpetuity than an individual. I myself do not see how a corporation would be in that position.

CHAIRMAN HUTCHINSON: Mr. Prettie.

MR. PRETTIE: Mr. Chairman, I would like to direct a question to Delegate Woolfenden, whom I believe discussed section 3. My question is this: we have now thousands of Michigan corporations existing under the present general corporation act within the constitution, article XII, section 3. What will be their legal status under this proposed exclusion? Will their life automatically be extended indefinitely?

MR. WOOLFENDEN: Frankly, I am not in a position to answer that authoritatively. I believe that the attorney general, at the conclusion of this convention — should the constitution be adopted — will have to give an opinion on that. My own thought is that corporations presently in existence would have their charters extended indefinitely by the adoption of the constitution. If not, upon their first renewal they could then renew for an indefinite period.

MR. PRETTIE: Thank you, sir. I merely wanted the record clear.

CHAIRMAN HUTCHINSON: Are there any amendments to the body of the exclusion report? If not, it will pass.

Exclusion Report 2006 is passed.

The secretary will read the next proposal.

SECRETARY CHASE: Item 8 on the calendar, from the committee on miscellaneous provisions and schedule, by Mr. Erickson, chairman, **Committee Proposal 21,** A proposal per-

taining to the division of the powers of government. Amends article IV.

Following is Committee Proposal 21 as read by the secretary, and the reasons submitted in support thereof:

The committee recommends that the following be included in the constitution:

The powers of government are divided into 3 [departments] BRANCHES: The legislative, executive and judicial.

No person belonging to 1 [department] BRANCH shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

Mr. Erickson, chairman of the committee on miscellaneous provisions and schedule, submits the following reasons in support of Committee Proposal 21:

This is the doctrine of the separation of powers, a principle quite fundamental in our system of government. It is this principle which distinguishes the foundations of our American governments from the parliamentary systems of Britain and western Europe.

The apportionment of powers to 1 of the 3 coordinate branches is understood to be a prohibition of its exercise by either of the others. By a system of checks and balances of government, each is a restraint upon the rest. The 3 branches are equal under our constitution and are to be kept as distinct as possible.

The powers of 1 branch cannot be extended to another otherwise than by explicit language or by necessary implication, to be discovered in the constitution itself.

The doctrine of the separation of powers prevents the collection of governmental powers into the hands of 1 man, thus protecting the rights of the people. It is as old as our American governmental system, and was devised by our founding fathers, greatly influenced by the French political theorist, Montesquieu. Desirous of protecting a free people, their idea was that if, somehow, the powers of government could be divided, it could not grow so large as to enslave them.

Basically the doctrine means that he who makes a law shall not enforce it, nor sit in judgment upon it; that he who enforces a law shall not make or change it nor shall he judge of its violation; and he who sits in judgment shall have neither made the law nor enforced it.

This doctrine is so much accepted in our system, that it is unexpressed in the Constitution of the United States and in at least 10 of our sister state constitutions. Without exception, the doctrine is found within those constitutions, from the structure of government created.

It may be conceded, therefore, that the substance of article IV of the Constitution of 1908 could be excluded from a new constitution without risk of weakening the doctrine. But the doctrine has been expressed in all of Michigan's earlier constitutions and it is the recommendation of the committee that it should be reexpressed in a new one.

The committee has substituted the word BRANCH for the word DEPARTMENT, for the reason that in modern usage the word "department" means a division of the executive branch, as the department of state, treasury department, department of conservation, etc.

This report is concurred in by the committee on judicial branch, the committee on legislative powers and the committee on executive branch.

CHAIRMAN HUTCHINSON: The Chair recognizes the chairman of the committee, Mr. Erickson.

MR. ERICKSON: This report is for the entire article IV. This report was prepared by Delegate Hutchinson along with his committee, and obviously I can't yield to him this afternoon. This report that he and his committee prepared really reads like a text book. The only change in this takes out the words "department and departments" and substitutes the words "branch and branches."

[The supporting reasons for Committee Proposal 21 were read by Mr. Erickson. For text, see above.]

To me, the most important part of this report is the phrase "Basically, the doctrine means that he who makes a law shall not enforce it." I recommend the adoption of the report.

CHAIRMAN HUTCHINSON: Are there any amendments to the body of the proposal? Mr. Heideman.

MR. HEIDEMAN: Mr. Chairman, fellow delegates, I would just like to make a statement in connection with this historic document. I taught American government, constitutional history and some constitutional law for a long time, and I used to say rather jokingly to my students that some day I should like to have the honor of being elected to a constitutional convention to make a correction in the historical records.

I have on my desk 6 documents, I believe, which purport to contain the Michigan constitution, and reference in all of them is to the doctrine of division of powers, not separation of powers — all except the Comparative Analysis of the Michigan Constitution by the citizens research council. That refers to the doctrine of separation of powers. Now, of course, there is the question of the caption. That is descriptive and not part of article IV itself.

I introduced a proposal which I believe the committee took into consideration, because part of my proposal was adopted. The part that was adopted was the substitution of the word "branch" for the word "department" on the grounds that Chairman Erickson read from the report.

By the way, I would like to say that I think that this is a masterful and brief presentation of the doctrine of separation of powers; the presentation as it is contained in this committee report, and though I have read on this for many years and many places, I enjoyed reading it very much.

Now, in my proposal I suggested, in addition to changing the word "department" to "branch," also the substitution of the word "separated" for "divided." It would have then read, "The powers of government are separated into 3 branches."

Now, perhaps it is a better expression to say "divided." I will not raise any point about that. I would like, however, for the record, a change to be made in future references to this doctrine as the doctrine of the separation of powers; one of the world's most famous doctrines in the history of the development of constitutional government and human liberty.

The doctrine of the division of powers is the doctrine which refers to the distribution of power between the federal government and the state governments, whether delegated expressly or by implication.

I would like to call attention also to the accompanying terms "checks and balances," "coordinate branches of government," that is, executive, legislative and judicial branches, along with this doctrine and terminology, "separation of powers," and I would like to end up with a quotation from a very famous constitution in which I believe this is most felicitously expressed; the famous Constitution of Massachusetts of 1780 by John Adams. I will not read the whole constitution, just the felicitous expressions.

> In the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

That haunts me, that expression.

CHAIRMAN HUTCHINSON: Are there any amendments to the body of the proposal?

Mr. Higgs.

MR. HIGGS: Mr. Chairman, I would like to direct a question to Mr. Erickson. I noticed in the committee report which you read it states:

> Basically the doctrine means that he who makes a law

Explanation—Matter within [ ] is stricken, matter in capitals is new.

MI SAFE START

A PLAN TO RE-ENGAGE MICHIGAN'S ECONOMY

Governor Gretchen Whitmer

May 7, 2020

GEORGE W. ROMNEY BUILDING - 111 SOUTH CAPITOL AVENUE - LANSING, MICHIGAN 48909
www.michigan.gov
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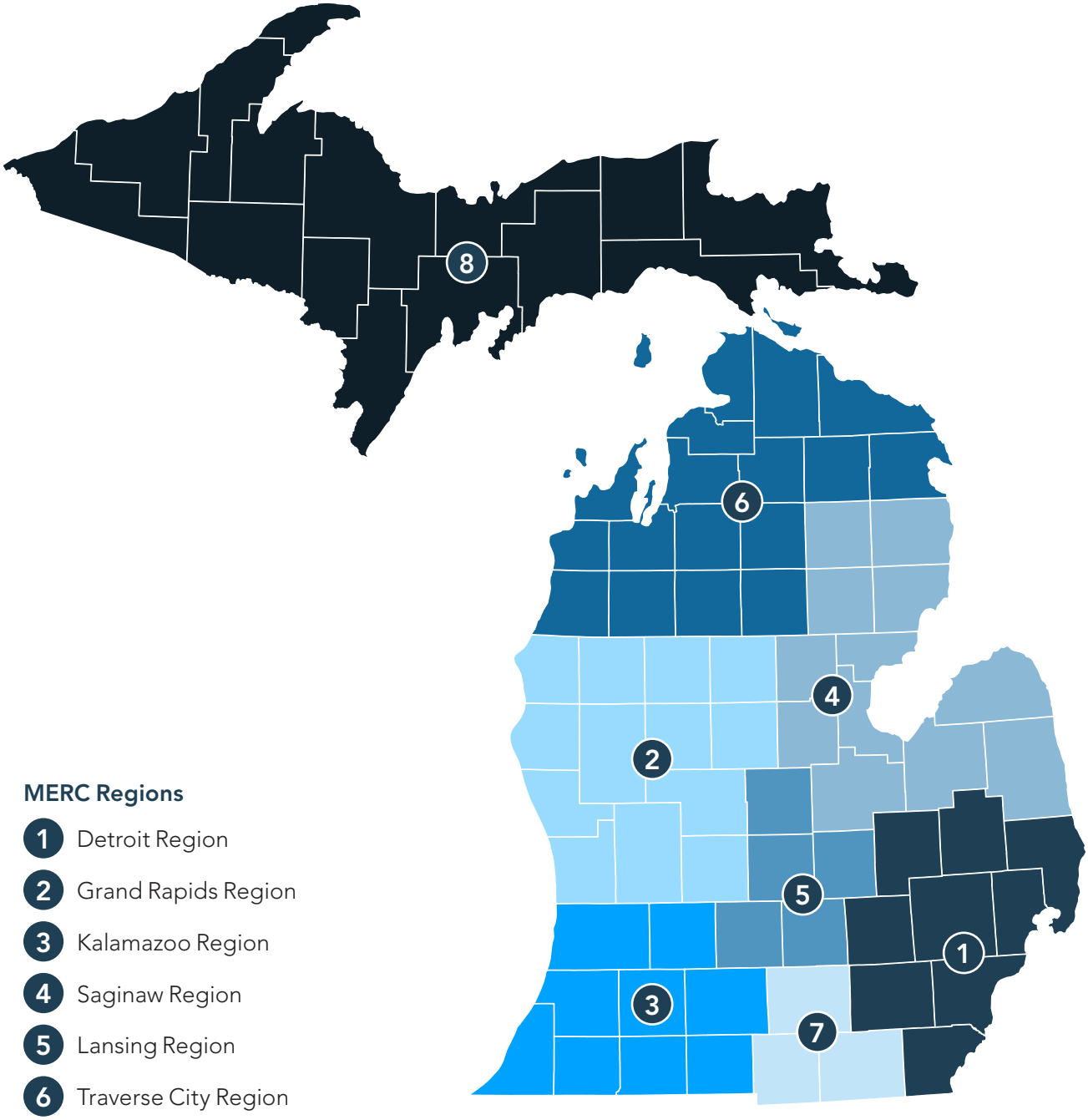
MI SAFE START PLAN

	1 Uncontrolled growth	2 Persistent spread	3 Flattening	4 Improving	5 Containing	6 Post-pandemic
What's happening with the disease?	Increasing number of new cases every day, likely to overwhelm the health system	Continue to see high case levels with concern about health system capacity	Case growth is gradually declining	Cases, hospitalizations and deaths are clearly declining	Continued case and death rate improvements and outbreaks can be quickly contained	Community spread not expected to return
What do we need to do to stay safe?	**Stay Home, Stay Safe:** Strict social distancing, travel restrictions, face coverings, hygiene best practices, remote work	**Stay Home, Stay Safe:** Strict social distancing, travel reduction, face coverings, hygiene best practices, remote work	**Safer at Home:** Continued distancing, increased face coverings No gatherings	**Safer at Home:** Continued distancing, face coverings, safe workplace practices Small gatherings	**Stay Safe:** Adherence to new guidelines. Continued distancing, coverings, mitigated workplaces Increased size gatherings	Sufficient community immunity and availability of treatment
What work can we do? *(Examples)*	Critical infrastructure • First responders • Health care workers • Critical manufacturing • Food and agriculture • Essential retail (e.g., grocery) • Transportation	Critical infrastructure Additional types of recreation allowed	Specified lower-risk businesses with strict workplace safety measures • Construction • Manufacturing • Real estate • Outdoor work	Additional lower-risk businesses with strict safety measures • Other retail, with capacity limits • Offices, but telework required if possible	Most businesses, with strict mitigation measures • Restaurants / bars • K-12 and higher ed. (live instruction) • Travel	All businesses Events and gatherings of all sizes with new safety guidance and procedures Social distancing rules are relaxed and large events are permitted
What factors determine progression to next phase?	Analysis shows epidemic growth rates slowing Hospital and treatment capacity built, alternative care facilities established Infrastructure for crisis response and data systems to monitor progression are in place	Cases, deaths decline for extended period Monitor impact on vulnerable populations Sufficient health system capacity in place Improved testing, contact tracing and containment capacity	Cases and deaths decline more sharply, percent positivity decreasing Healthcare system capacity continues to strengthen Robust testing, contact tracing and containment protocols in place	Cases and deaths at low absolute rates per capita Health system capacity is very strong Robust testing, contact tracing and containment protocols in place	High uptake of an effective therapy or vaccine	

It is also possible to move backwards if risk increases and if we stop adhering to safe practices

Note: This framing is being updated and refined as additional guidance from CDC and public health experts becomes available

MICHIGAN ECONOMIC RECOVERY COUNCIL REPORTING REGIONS



MERC Regions

1. Detroit Region
2. Grand Rapids Region
3. Kalamazoo Region
4. Saginaw Region
5. Lansing Region
6. Traverse City Region
7. Jackson Region
8. Upper Peninsula

INTRODUCTION

We have made tremendous progress in fighting COVID-19 in Michigan. Our medical workers, first responders, and other critical workers have put their lives on the line for us every day, and we owe it to them to do whatever we can to stop the spread of the virus.

All of us know the importance of getting the economy moving again. We have already loosened some restrictions on landscaping, construction, and manufacturing. But the worst thing we could do is open up in a way that causes a second wave of infections and death, puts health care workers at further risk, and wipes out all the progress we've made.

We will keep listening to experts and examining the data here in Michigan to reduce deaths, keep our healthcare system from collapsing, and protect those working on the front lines.

Together, we will move forward.

Governor Gretchen Whitmer's MI Safe Start Plan outlines how we will begin to re-engage while continuing to keep our communities safe. Re-engagement will happen in phases. Those businesses that are necessary to protect and sustain life are already open. As we move into lower-risk phases, additional business categories will re-open and the restrictions on public gatherings and social interactions will ease.

As always, we will be guided by the facts in deciding whether to transition from one phase to another. We are looking at data every day to understand where we are: data that tells us where the epidemic is spreading, whether our hospitals and other health-care providers can safely cope with any surge in infections, and whether our public health system is up to the task of suppressing new outbreaks.

We need to keep working to expand testing and require people who test positive, or are close contacts of those who do, to self-isolate. Moving too fast without the tests we need could put Michigan at risk of a second wave of infections. The most important thing right now is to listen to the experts and follow the medical science.

We are also looking at the best available evidence on the risks that different business sectors present and the steps that can be taken to mitigate those risks and protect workers. Our Safe Start Plan has been guided by the state's top public health and university experts, and is based on input from a wide range of experts, including the CEOs of major Michigan companies, labor and union leaders, and small business owners around Michigan.

We must reopen gradually and safely. By proceeding incrementally, we can evaluate the effects of our decisions. If cases start to surge, we may need to tighten up again. If the disease is contained, we can keep relaxing. The MI Safe Start Plan will re-engage our economy carefully and deliberately to avoid a second wave of infections.

This will be a long process. Our ability to move forward depends on all of us and on our collective commitment to protecting ourselves and others—whether at home, at work, or anywhere else we go. We will always put the health and safety of Michiganders first.

STAGES OF OUR RESPONSE

In Governor Whitmer's Safe Start Plan, we evaluate where the state and each of its regions are across six phases of this epidemic:

1. **Uncontrolled growth:** Increasing number of new cases every day, likely to overwhelm the health system. Only critical infrastructure remains open.
2. **Persistent spread:** Continue to see high case levels with concern about health system capacity. Only critical infrastructure remains open, with lower-risk recreational activities allowed.
3. **Flattening:** Epidemic is no longer increasing and health system capacity is sufficient for current needs. Specified lower-risk businesses can reopen given adherence to strict safety measures.
4. **Improving:** Epidemic clearly decreasing and health system capacity is strong with robust testing and contact tracing. Additional businesses can reopen given adherence to strict safety measures.
5. **Containing:** Epidemic levels are extremely low and outbreaks can be quickly contained. Health system capacity is strong with robust testing and tracing. Most businesses can reopen given adherence to strict safety measures.
6. **Post-pandemic:** Community spread is not expected to return (e.g., because of a vaccine) and the economy is fully reopened.

Assessing which phase we are in involves a comprehensive review of the facts on the ground. Guided by our experts, we are closely monitoring data that allows us to answer three questions:

A. Is the epidemic growing, flattening, or declining?

B. Does our health system have the capacity to address current needs? Can it cope with a potential surge of new cases?

C. Are our testing and tracing efforts sufficient to monitor the epidemic and control its spread?

We have also worked with our best public health experts and the business community to assess the infection risks posed by workplaces across every sector of the economy. In general, those businesses that are likely to re-open sooner are those that present lower levels of infection risk and whose work cannot be performed remotely. We have also evaluated risk mitigation strategies to minimize the chance that any infection will spread at the workplace. Within each phase, businesses may reopen in a staggered manner to ensure safety. Finally, as our understanding of this disease improves, our assessments of what is appropriate in each phase could change to match the latest scientific evidence.

We are also establishing working groups to advise the state on how we can safely re-engage child care and summer camps, as well as businesses such as restaurants and bars, travel and tourism, and entertainment venues, so that when it is safe, there are best practices established for how to partially open in a low-risk manner.

The following sections outline our approach for moving between phases as well as details on each phase of the MI Safe Start Plan.

When do we move between phases?

Guided by our public health experts, we are carefully evaluating the best available data to understand the degree of risk and readiness in Michigan. We are complementing that analysis with an understanding of the on-the-ground contextual realities. This comprehensive assessment is a critical input into whether we are prepared to move to the next phase and – just as importantly – whether the disease is surging and we need to adjust our approach.

It is crucial that we monitor the impact of each set of re-engagement activities before moving into the next phase. New transmission can take some time to become visible, and we need to understand any impact of previous re-engagement activities on new disease spread before evaluating a transition to the next stage. As we move into later phases, or if our progress stalls out, it may take longer to move from one phase to another.

Furthermore, it is important to evaluate indicators together: even though some may point to a lower level of risk, others may not. For example, if cases are declining but the health system does not have capacity to address a sudden uptick in cases, the degree of overall risk may still be high.

We will also examine whether different regions within Michigan may be at different phases. That inquiry, too, must be holistic: a region with a low rate of infection may have limited hospital capacity, for example, which puts it at relatively greater risk if an outbreak occurs. Where appropriate, however, regional tailoring makes sense for a state as large and diverse as ours.

Examples of the evidence reviewed for each of the three questions is described below:

A. Is the epidemic growing, flattening, or declining?

Evidence analyzed includes:

- **The number of new cases per million:** low levels of new cases can suggest limited continued transmission; high levels of new cases can suggest continued transmission activity.
- **Trends in new daily cases:** sustained decreases may suggest that there has not been new takeoff of the disease; increases would provide concern that there has been new takeoff.
- **% positive tests:** if testing levels are high, a low proportion of positive tests is further evidence of declining spread, and also suggests that we have a good understanding of the state of the epidemic. If there is a high proportion of positive tests, it could suggest further disease spread, or that we have a poor understanding of the true extent of the epidemic.

B. Does our health system have the capacity to address current needs as well as a potential increase, should new cases emerge?

Evidence analyzed includes:

- **Hospital capacity:** if hospitals are able to surge to accommodate a higher case load, it suggests that, if a small uptick in new cases occurred during additional re-engagement, our health system would not be overwhelmed. If hospitals are not able to surge in this way, any new case spread could threaten our health system.
- **PPE availability:** if hospitals have sufficient PPE to manage increased caseloads, it suggests health system capability to handle a small uptick in new cases.

C. Are our testing and tracing efforts sufficient to monitor the epidemic and control its spread?

Evidence analyzed includes:

- **Testing capacity:** if we are able to ensure that the individuals at risk in each re-engagement phase have access to testing when needed, we will be able to give individuals the information they need to stay safe and, at the same time, allow us to closely track the impact of re-engagement activities on our case growth. If we do not have this testing capacity, it will be harder to give our people and our decision-makers the information they need.
- **Tracing and containment effectiveness:** if we are able to quickly follow up on any newly identified cases and associated contacts, and if those individuals effectively self-isolate, we can more successfully contain any new increase in disease spread. Otherwise, transmission is likely to be higher, increasing our risk.

As new guidance continues to be provided by the CDC and other public health experts, our assessment will adjust to be continually informed by the best available science.

PHASE 1: UNCONTROLLED GROWTH

What does it look like

The number of daily new cases increases by a constant rate every day, which leads to an increasingly accelerating case curve. If a community remains in this phase for an extended period of time, healthcare facilities could quickly be overwhelmed. Because unmitigated behavior contributes to the exponential growth, communities can slow the growth rate and exit this phase by introducing social distancing practices and wearing masks when in public.

What work can we do

What do we need to do to stay safe

Businesses and organizations

Only work that is necessary to protect or sustain life will be permitted

- **Retail:** Limited to grocery stores and other critical retail (e.g., pharmacies)
- **Public Transportation:** Permitted
- **Restaurants & Bars:** Available for take-out, delivery and drive-through only
- **Manufacturing:** Critical manufacturing only
- **Construction:** Only permitted for critical infrastructure projects
- **Food & Agriculture:** Permitted
- **Offices:** Closed to all non-critical workers during this phase
- **Education & Child Care:** Remote learning in K-12 and higher educaion, child care for critical workers

Personal and social

- **Social Distancing:** In place, maintain a six-foot distance from others when outdoors / in public
- **Face coverings:** Required
- **Gatherings:** Not permitted
- **Outdoor Recreation:** Walking, hiking, biking permitted
- **Quarantine/Isolation:** Individuals who have confirmed or suspected COVID-19 must isolate, and any individual with a known exposure must quarantine, according to CDC and public health guidance
- **At-risk populations:** All at-risk individuals should continue to shelter in place. Members of households with at-risk residents should be aware that by returning to work or other environments where distancing is not possible, they could carry the virus back home. Precautions should be taken to isolate from at-risk residents. Businesses should strongly consider special accommodations for personnel who are members of an at-risk population

PHASE 2: PERSISTENT SPREAD

What does it look like

This phase occurs after the Uncontrolled Growth phase, but when the epidemic is still expanding in the community. There are still high case levels, but the growth rate might gradually decrease. Within this phase, the epidemic is widespread in a community and source of infection is more difficult to trace. Even though the growth rate of new cases is decreasing, high volumes of infected individuals mean that health systems could become overwhelmed, leading to higher mortality rates. During this phase, it is important to maintain social distancing practices in order to slow the spread to a level that health systems can handle as they are continuing to build capacity.

What work can we do

What do we need to do to stay safe

Businesses and organizations

Only work that is necessary to protect or sustain life will be permitted

- **Retail:** Limited to grocery stores and other critical retail (e.g., pharmacies), plus curbside or delivery for nonessential retail
- **Public Transportation:** Permitted
- **Restaurants & Bars:** Available for take-out, delivery and drive-through only
- **Manufacturing:** Critical manufacturing only
- **Construction:** Only permitted for critical infrastructure projects
- **Food & Agriculture:** Permitted
- **Offices:** Closed to all non-critical workers during this phase
- **Education & Child Care:** Remote learning in K-12 and higher education, child care for critical workers

Personal and social

- **Social Distancing:** In place, maintain a six-foot distance from other when outdoors / in public
- **Face coverings:** Required
- **Gatherings:** Not permitted
- **Outdoor Recreation:** Walking, hiking, biking permitted. Additional recreation allowed, including golfing and motorboating
- **Quarantine/Isolation:** Individuals who have confirmed or suspected COVID-19 must isolate, and any individual with a known exposure must quarantine, according to CDC and public health guidance
- **At-risk populations:** All at-risk individuals should continue to shelter in place. Members of households with at-risk residents should be aware that by returning to work or other environments where distancing is not possible, they could carry the virus back home. Precautions should be taken to isolate from at-risk residents. Businesses should strongly consider special accommodations for personnel who are members of an at-risk population

PHASE 3: FLATTENING

What does it look like

This phase occurs when daily new cases and deaths remain relatively constant over a time period. Often, this occurs because communities have started to use social distancing practices and transmission rates have fallen to manageable levels. Because new cases are not constantly increasing, health system capacity has time to expand to epidemic needs and is not typically overwhelmed. During this phase, testing and contact tracing efforts are ramped up statewide. To prevent each infected individual from spreading the virus unchecked, rapid case investigation, contact tracing, and containment practices are necessary within a community.

What work can we do

What do we need to do to stay safe

Businesses and organizations

Non-critical businesses that pose lower risk of infection are able to open with increased safety measures during this phase:

- **Retail:** Limited to grocery stores and other critical retail (e.g., pharmacies), plus curbside or delivery for nonessential retail
- **Public Transportation:** Permitted
- **Restaurants & Bars:** Available for take-out, delivery and drive-through only
- **Manufacturing:** Permitted with additional safety measures and guidelines
- **Construction:** Permitted with additional safety measures and guidelines
- **Food & Agriculture:** Permitted
- **Offices:** Closed to all non-critical workers
- **Education & Child Care:** Remote learning in K-12 and higher education, child care for critical workers and anyone resuming work activities
- **Outdoor work:** Permitted with additional safety measures and guidelines

Personal and social

- **Social Distancing:** In place, maintain a six-foot distance from other when outdoors / in public
- **Face coverings:** Required
- **Gatherings:** Not permitted
- **Outdoor Recreation:** Walking, hiking, biking, golfing, boating permitted
- **Quarantine/Isolation:** Individuals who have confirmed or suspected COVID-19 must isolate, and any individual with a known exposure must quarantine, according to CDC and public health guidance
- **At-risk populations:** All at-risk individuals should continue to shelter in place. Members of households with at-risk residents should be aware that by returning to work or other environments where distancing is not possible, they could carry the virus back home. Precautions should be taken to isolate from at-risk residents. Businesses should strongly consider special accommodations for personnel who are members of an at-risk population

PHASE 4: IMPROVING

What does it look like

This phase occurs when the number of new cases and deaths has fallen for a period of time, but overall case levels are still high. When in the Improving phase, most new outbreaks are quickly identified, traced, and contained due to robust testing infrastructure and rapid contact tracing. Health system capacity can typically handle these new outbreaks, and therefore case fatality rate does not rise above typical levels. Though a community might be in a declining phase, the overall number of infected individuals still indicate the need for distancing to stop transmission and move to the next phase.

What work can we do

What do we need to do to stay safe

Businesses and organizations

Most business and organizations will be open throughout this phase under strict safety measures. These include:

- **Retail:** Permitted with additional safety measures and guidelines (e.g., limited capacity)
- **Public Transportation:** Permitted
- **Restaurants & Bars:** Available for take-out, delivery and drive-through only
- **Manufacturing:** Permitted with additional safety measures and guidelines
- **Construction:** Permitted with additional safety measures and guidelines
- **Food & Agriculture:** Permitted
- **Offices:** Open (remote work still required where feasible)
- **Education:** Remote learning in K-12 and higher education, summer programs in small groups
- **Outdoor work:** Permitted with additional safety measures and guidelines

Personal and social

- **Social Distancing:** In place, maintain a six-foot distance from other when outdoors / in public
- **Face coverings:** Required
- **Gatherings:** Limited to small groups with social distancing
- **Outdoor Recreation:** Walking, hiking, biking, golfing, boating permitted. Activities permitted in small groups with social distancing
- **Quarantine/Isolation:** Individuals who have confirmed or suspected COVID-19 must isolate, and any individual with a known exposure must quarantine, according to CDC and public health guidance
- **At-risk populations:** All at-risk individuals should continue to shelter in place. Members of households with at-risk residents should be aware that by returning to work or other environments where distancing is not possible, they could carry the virus back home. Precautions should be taken to isolate from at-risk residents. Businesses should strongly consider special accommodations for personnel who are members of an at-risk population

PHASE 5: CONTAINING

What does it look like

During the Containing phase, new cases and deaths continue to decrease for an additional period of time. At this point, the number of active cases has reached a point where infection from other members of the community is less common. With widespread testing, positivity rates often fall much lower than earlier phases. Rapid case investigation, contact tracing, and containment strategies cause new cases to continue to fall. However, if distancing and other risk mitigation efforts are not continued, infections could begin to grow again because a permanent solution to the epidemic has not yet been identified.

What work can we do

What do we need to do to stay safe

Businesses and organizations

Most business and organizations will be open throughout this phase under strict safety measures

- **Retail:** Permitted with additional safety measures and guidelines (e.g., limited capacity)
- **Public Transportation:** Permitted
- **Restaurants & Bars:** Available for dine-in with additional safety measures and guidelines
- **Manufacturing:** Permitted with additional safety measures and guidelines
- **Construction:** Permitted with additional safety measures and guidelines
- **Food & Agriculture:** Permitted
- **Offices:** Open with additional safety measures and guidelines
- **Education:** Live instruction in K-12 and higher education
- **Outdoor work:** Permitted with additional safety measures and guidelines

Personal and social

- **Social Distancing:** In place, maintain a six-foot distance from other when outdoors / in public
- **Face coverings:** Required wherever possible
- **Gatherings:** Incrased but still limited-sized groups with social distancing
- **Outdoor Recreation:** All outdoor recreation allowed
- **Quarantine/Isolation:** Individuals who have confirmed or suspected COVID-19 must isolate, and any individual with a known exposure must quarantine, according to CDC and public health guidance
- **At-risk populations:** All at-risk individuals should continue to shelter in place. Members of households with at-risk residents should be aware that by returning to work or other environments where distancing is not possible, they could carry the virus back home. Precautions should be taken to isolate from at-risk residents. Businesses should strongly consider special accommodations for personnel who are members of an at-risk population

PHASE 6: POST-PANDEMIC

What does it look like

Reaching this phase would mean that community spread is not expected to return, because of sufficient community immunity and availability of treatment. Because of this, the number of infected individuals falls to nearly zero and the community does not typically experience this strain of the epidemic returning. All areas of the economy reopen, and gatherings of all sizes resume.

What work can we do

Businesses and organizations

All businesses and organizations open with some lasting safety requirements

What do we need to do to stay safe

Personal and social

Minimal to no lasting limitations on personal and/or social activities

CONTROLLING SPREAD IN THE WORKPLACE

There are best practices workplaces should follow, with different levels of importance depending on the industry. The proper implementation of these best practices will mitigate risk in the workplace and allow for a safe and sustained return to work. If workplaces fail to follow some or all of these guidelines, it may curb the state-wide progress toward the revitalization phase and result in a re-instating of stricter social limitations.

These best practices fall into five categories:

A. Access control: Implementing best practices to quickly identify and catalogue potential introductions of COVID-19 into the workplace

- Daily symptom diaries (mandatory questionnaires self-attesting to symptoms and contacts)
- On-site temperature checks
- Rapid diagnostic testing protocols
- Intake procedures for visitors
- Guidelines for delivery areas

B. Social distancing: Minimizing levels of close contact within the workplace to limit the spread of COVID-19 among workers

- Remote work (standards for who can work in person, social distancing guidelines for work from home)
- Restrictions on common instances of non-essential close contact (e.g., crowded conference rooms, cafeterias)
- Restriction on in-person meeting size
- Physical barriers between workspaces

C. Sanitation / Hygiene: Increasing both the frequency and vigor of common cleaning practices as well as implementing new ones to reduce the amount of time COVID-19 can live on surfaces

- Frequent disinfection / cleaning (facilities and equipment)
- Local exhaust ventilation
- HEPA filters on HVAC units
- Availability of hand-washing facilities
- Restrictions on shared tooling / machinery

D. PPE: Ensuring all employees have access to personal protective equipment to keep them from both contracting and transmitting the COVID-19 virus

- Masks to be worn whenever workers cannot consistently maintain six-feet of separation
- Gloves as necessary
- Face shields as necessary

E. Contact tracing / Isolation: Designing and imparting to employees important procedures and protocols on what occurs if an employee is suspected to have and/or diagnosed with COVID-19

- Isolation protocols
- Notification protocols (HR, first responders, government authorities)
- Investigation standards
- Facility cleaning / shutdown procedure
- Quarantine and return-to-work guidelines

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-4

Declaration of State of Emergency

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person.

COVID-19 has been identified as the cause of an outbreak of respiratory illness first detected in Wuhan City in the Hubei Province of China. Person-to-person spread of the virus has occurred in the United States, with some of those occurring in people with no travel history and no known source of exposure. On January 31, 2020, the United States Department of Health and Human Services Secretary Alex Azar declared a public health emergency for COVID-19, and affected state and local governments have also declared states of emergency.

The State of Michigan has been taking proactive steps to prevent and prepare for the spread of this disease. On February 3, 2020, the Michigan Department of Health and Human Services (MDHHS) activated the Community Health Emergency Coordination Center, and has been working diligently with local health departments, health systems, and medical providers throughout Michigan to make sure appropriate screening and preparations for COVID-19 are being made. On February 28, 2020, I activated the State Emergency Operations Center to maximize coordination with state, local and federal agencies, as well as private partners, and to help prevent the spread of the disease. On March 3, 2020, I created four task forces comprising key state government agencies to coordinate the state's response and work closely with the appropriate community and non-governmental stakeholders to combat the spread of COVID-19 and assess the impact it may have on Michiganders' day-to-day lives. And throughout this time, the State has been working with schools, businesses, medical providers, local health departments, and residents to make sure they have the information they need to prepare for potential cases.

On March 10, 2020, MDHHS identified the first two presumptive-positive cases of COVID-19 in Michigan.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency if he or she finds that an emergency has occurred or that the threat of an emergency exists."

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, . . . the governor may proclaim a state of emergency and designate the area involved."

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency is declared across the State of Michigan.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 10, 2020

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/10/2020 AT 11:30pm

SECRETARY OF SENATE
2020 MAR 11 AM 9:02

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-17

Temporary restrictions on non-essential medical and dental procedures

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, provide essential protections to vulnerable Michiganders, and ensure the availability of health care resources, it is reasonable and necessary to impose temporary restrictions on non-essential medical and dental procedures.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. Beginning as soon as possible but no later than March 21, 2020 at 5:00 pm, and continuing while the state of emergency declared in Executive 2020-4 is in effect, all hospitals, freestanding surgical outpatient facilities, and dental facilities, and all state-operated outpatient facilities (collectively, "covered facilities"), must implement a plan to temporarily postpone, until the termination of the state of emergency under section 3 of Executive Order 2020-4, all non-essential procedures ("non-essential procedure postponement plan" or "plan"). For purposes of this order, "non-essential procedure" means a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider.

2. A plan for a covered facility that performs medical procedures, including any medical center or office that performs elective surgery or cosmetic plastic surgery, must postpone, at a minimum, joint replacement, bariatric surgery, and cosmetic surgery, except for emergency or trauma-related surgery where postponement would significantly impact the health, safety, and welfare of the patient. A plan for a covered facility that performs medical procedures should exclude from postponement: surgeries related to advanced cardiovascular disease (including coronary artery disease, heart failure, and arrhythmias) that would prolong life; oncological testing, treatment, and related procedures; pregnancy-related visits and procedures; labor and delivery; organ transplantation; and procedures related to dialysis. A plan for a covered facility that performs medical procedures must exclude from postponement emergency or trauma-related procedures where postponement would significantly impact the health, safety, and welfare of the patient.

3. A plan for a covered facility that performs dental procedures must postpone, at a minimum: any cosmetic or aesthetic procedures (such as veneers, teeth bleaching, or cosmetic bonding); any routine hygiene appointments; any orthodontic procedures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; initiation of any crowns, bridges, or dentures that do not relieve pain or infection, do not restore oral function, or are not trauma-related; any periodontal plastic surgery; any extractions of asymptomatic non-carious teeth; and any recall visits for periodontally healthy patients. If a covered facility that performs dental procedures chooses to remain open, its plan must exclude from postponement emergency or trauma-related procedures where postponement would significantly impact the health, safety, and welfare of the patient.

4. A covered facility must comply with the restrictions contained in its non-essential procedure postponement plan.

5. This order does not alter any of the obligations under law of an affected health care facility to its employees or to the employees of another employer.

6. The director of the Department of Licensing and Regulatory Affairs shall issue orders or directives pursuant to law as necessary to enforce this order.

7. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: March 20, 2020

Time: 12:28 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

FILED WITH SECRETARY OF STATE
ON 3/20/20 AT 2:48 P.M.

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-33

Expanded emergency and disaster declaration

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus has spread across Michigan. To date, the state has 9,334 confirmed cases of COVID-19 and 337 people have died of the disease. Many thousands more are infected but have not been tested. Hospitals in Oakland, Macomb, Wayne, and Washtenaw counties are reporting that they are full or nearly full to capacity. Ventilators and personal protective equipment are in short supply and high demand. Michigan needs more medical personnel than are currently available to care for COVID-19 patients. Dormitories and a convention center are being converted to temporary field hospitals.

The best way to slow the spread of COVID-19 is for people to stay home and keep their distance from others. To that end, and pursuant to the recommendations of public health experts, I have restricted access to places of public accommodation and school buildings in Executive Orders 2020-20 and 2020-11, respectively. And in Executive Order 2020-21, I have limited gatherings and travel, and have required all workers who are not necessary to sustain or protect life to remain at home.

Social distancing, though necessary to combat COVID-19, has harsh economic consequences. Almost overnight, businesses and government agencies have had to dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: over the past two weeks alone, nearly a half-million of them submitted claims for unemployment insurance. That is more claims than were filed in the entirety of the prior calendar year.

The economic damage—already severe—will compound with time. On March 19, 2020, economists at the University of Michigan forecasted that as many as 1 in 10 Michiganders could be unemployed by the fall and that economic sectors that feature substantial social interaction could contract by as much as 50%. As a result, many families in Michigan will struggle to pay their bills or even put food on the table.

My administration has already taken aggressive measures to mitigate the economic harms of this pandemic. In Executive Order 2020-18, we placed strict rules on businesses to prevent price gouging. In Executive Order 2020-19, we put a temporary hold on evictions for families that cannot make their rent. And in Executive Order 2020-24, we expanded eligibility for unemployment benefits.

Nonetheless, the COVID-19 pandemic has disrupted and will continue to disrupt our economy, our homes, and our educational, civic, social, and religious institutions. School closures have made it harder to educate our children and have increased strain on parents, many of whom continue to work from home. The closure of museums and theaters will limit people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic are widespread and severe, and they demand we do more.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.403(3)-(4), provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency" and/or a "state of disaster" upon finding that an emergency and/or disaster has occurred or is threatening to occur.

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31(1), provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state . . . the governor may proclaim a state of emergency and designate the area involved."

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency and a state of disaster are both declared across the State of Michigan.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency and the state of disaster will terminate when emergency and disaster conditions no longer exist and appropriate programs have been implemented to recover from any effects of the statewide emergency and disaster,

consistent with the legal authorities upon which this declaration is based and any limits imposed by those authorities, including section 3 of the Emergency Management Act, 1976 PA 390, as amended, MCL 30.403.

4. Executive Order 2020-4 is rescinded and replaced. All previous orders that rested on Executive Order 2020-4 now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 1, 2020

Time: 3:30 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-42

Temporary requirement to suspend activities that are not necessary to sustain or protect life

Rescission of Executive Order 2020-21

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

In the three weeks that followed, the virus spread across Michigan, bringing deaths in the hundreds, confirmed cases in the thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. The order limited gatherings and travel, and required workers who are not necessary to sustain or protect life to stay home.

The measures put in place by Executive Order 2020-21 have been effective, but this virus is both aggressive and persistent: on April 8, 2020, Michigan reported 20,346 confirmed cases of COVID-19 and 959 deaths from it. To win this fight, and to protect the health and safety of our state and each other, we must be just as aggressive and persistent. Though we have all made sacrifices, we must be steadfast. Accordingly, with this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-21, clarify them, and extend their duration to April 30, 2020. This order takes effect on April 9, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. Subject to the exceptions in section 7 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

3. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

4. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life or to conduct minimum basic operations.

   (a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 8 and 9 of this order.

   (b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in section 10 of this order.

5. Businesses and operations that employ critical infrastructure workers may continue in-person operations, subject to the following conditions:

(a) Consistent with sections 8 and 9 of this order, businesses and operations must determine which of their workers are critical infrastructure workers and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:

(1) Workers in health care and public health.

(2) Workers who perform necessary government activities, as described in section 6 of this order.

(3) Workers and volunteers described in section 9(d) of this order.

(b) In-person activities that are not necessary to sustain or protect life must be suspended until normal operations resume.

(c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in section 10 of this order. Stores that are open to the public must also adhere to the rules described in section 11 of this order.

6. All in-person government activities at whatever level (state, county, or local) that are not necessary to sustain or protect life, or to support those businesses and operations that are necessary to sustain or protect life, are suspended.

(a) For purposes of this order, necessary government activities include activities performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders.

(b) Such activities also include, but are not limited to, public transit, trash pick-up and disposal (including recycling and composting), activities necessary to manage and oversee elections, operations necessary to enable transactions that support the work of a business's or operation's critical infrastructure

workers, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.

(c) For purposes of this order, necessary government activities include minimum basic operations, as described in section 4(b) of this order. Workers performing such activities need not be designated.

(d) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in section 10 of this order.

7. Exceptions.

(a) Individuals may leave their home or place of residence, and travel as necessary:

(1) To engage in outdoor physical activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor physical activity includes walking, hiking, running, cycling, kayaking, canoeing, or other similar physical activity, as well as any comparable activity for those with limited mobility.

(2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 5(a) of this order may leave their home for work without being designated.)

(3) To conduct minimum basic operations, as described in section 4(b) of this order, after being designated to perform such work by their employers.

(4) To perform necessary government activities, as described in section 6 of this order.

(5) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care that is necessary to address a medical emergency or to preserve the health and safety of a household or family member (including procedures that, in accordance with a duly implemented nonessential procedures postponement plan, have not been postponed).

(6) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their vehicles.

(A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to

purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences. Individuals may also leave the home to drop off a vehicle to the extent permitted under section 9(i) of this order.

(B) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.

(7) To care for a family member or a family member's pet in another household.

(8) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

(9) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

(10) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

(11) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(12) To attend a funeral, provided that no more than 10 people are in attendance at the funeral.

(b) Individuals may also travel:

(1) To return to a home or place of residence from outside this state.

(2) To leave this state for a home or residence elsewhere.

(3) Between two residences in this state, through April 10, 2020. After that date, travel between two residences is not permitted.

(4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

(c) All other travel is prohibited, including all travel to vacation rentals.

8. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available

here). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

(a) Health care and public health.

(b) Law enforcement, public safety, and first responders.

(c) Food and agriculture.

(d) Energy.

(e) Water and wastewater.

(f) Transportation and logistics.

(g) Public works.

(h) Communications and information technology, including news media.

(i) Other community-based government operations and essential functions.

(j) Critical manufacturing.

(k) Hazardous materials.

(l) Financial services.

(m) Chemical supply chains and safety.

(n) Defense industrial base.

9. For purposes of this order, critical infrastructure workers also include:

(a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of workers required to perform in-person work as permitted under this order. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.

(b) Workers at suppliers, distribution centers, or service providers, as described below.

(1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided

that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

(2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in subprovision (1) of this subsection may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

(3) Consistent with the scope of work permitted under subprovision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

(4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

(c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

(d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

(f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.

(g) Workers at laundromats, coin laundries, and dry cleaners.

(h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.

(i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic.

10. Businesses, operations, and government agencies that continue in-person work must adhere to sound social distancing practices and measures, which include but are not limited to:

(a) Developing a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available here. Such plan must be available at company headquarters or the worksite.

(b) Restricting the number of workers present on premises to no more than is strictly necessary to perform the business's, operation's, or government agency's critical infrastructure functions or its minimum basic operations.

(c) Promoting remote work to the fullest extent possible.

(d) Keeping workers and patrons who are on premises at least six feet from one another to the maximum extent possible.

(e) Increasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as adopting protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace.

(f) Adopting policies to prevent workers from entering the premises if they display respiratory symptoms or have had contact with a person with a confirmed diagnosis of COVID-19.

(g) Any other social distancing practices and mitigation measures recommended by the CDC.

11. Any store that remains open for in-person sales under section 5 or 9(f) of this order must:

(a) Establish lines to regulate entry in accordance with subsections (c) and (d) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.

(b) Consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

(c) For stores of less than 50,000 square feet of customer floor space, limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal.

(d) For stores of more than 50,000 square feet:

(1) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space. The amount of customer floor space must be calculated to exclude store areas that are closed under subprovision (2) of this subsection.

(2) Close areas of the store—by cordoning them off, placing signs in aisles, posting prominent signs, removing goods from shelves, or other appropriate means—that are dedicated to the following classes of goods:

(A) Carpet or flooring.

(B) Furniture.

(C) Garden centers and plant nurseries.

(D) Paint.

(3) By April 13, 2020, refrain from the advertising or promotion of goods that are not groceries, medical supplies, or items that are necessary to maintain the safety, sanitation, and basic operation of residences.

(4) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

(e) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in subsections (c) and (d) of this section as necessary to protect the public health.

12. No one shall advertise or rent a short-term vacation property except as necessary to assist in housing a health care professional or volunteer aiding in the response to the COVID-19 crisis.

13. Nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior

guidance, a place of religious worship, when used for religious worship, is not subject to penalty under section 17 of this order.

14. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority.

15. This order takes effect on April 9, 2020 at 11:59 pm and continues through April 30, 2020 at 11:59 pm. When this order takes effect, Executive Order 2020-21 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

16. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health-care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

17. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 9, 2020

Time: 2:07 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-66

Termination of the states of emergency and disaster declared under the Emergency Management Act in Executive Order 2020-33

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. The virus's rapid and relentless spread threatened to quickly overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals. And the virus had also brought deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I have issued

orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I have also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I have taken steps to begin building the public health infrastructure in this state that is necessary to contain the infection.

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 41,379 confirmed cases of COVID-19 in Michigan, and 3,789 deaths from the disease—fourfold and tenfold increases, respectively, since the start of this month. And there are still countless more who are infected but have not yet been tested. There remains no treatment for the virus; it remains exceptionally easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster.

The economic and social harms from this pandemic likewise persist. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: to date, roughly one quarter of the eligible workforce has filed for unemployment. And state revenue, used to fund many essential services such as our schools, has dropped sharply.

The economic damage—already severe—will continue to compound with time. Between March 15 and April 18, Michigan had 1.2 million initial unemployment claims—the fifth-highest nationally, amounting to nearly 24% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression. On April 9, 2020, economists at the University of Michigan forecasted that the U.S. economy will contract by 7% in the second quarter of this year, or roughly an annualized rate of 25%. As a result, many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Although local health departments have some limited capacity to respond to cases as they arise within their jurisdiction, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hotspots as they arise. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe.

Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work, which would undermine infection control and contribute to further spread of the virus. Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., provides that "[t]he governor shall, by executive order or proclamation, declare a state of emergency" and/or a "state of disaster" upon finding that an emergency and/or disaster has occurred or is threatening to occur. MCL 30.403(3) & (4). The Emergency Management Act further provides that a declared state of emergency or disaster

> shall continue until the governor finds that the threat or danger has passed, the [disaster/emergency] has been dealt with to the extent that [disaster/emergency] conditions no longer exist, or until the declared state of [disaster/emergency] has been in effect for 28 days. After 28 days, the governor shall issue an executive order or proclamation declaring the state of [disaster/emergency] terminated, unless a request by the governor for an extension of the state of [disaster/emergency] for a specific number of days is approved by resolution of both houses of the legislature. [*Id.*]

For the reasons set forth above, the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, and the disaster and emergency conditions it has created still very much exist. Twenty-eight days, however, have elapsed since I declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33. And while I have sought the legislature's agreement that these declared states of emergency and disaster should be extended, the legislature—despite the clear and ongoing danger to the state—has refused to extend them beyond today.

Accordingly, acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The state of emergency declared under the Emergency Management Act in Executive Order 2020-33 is terminated.

2. The state of disaster declared under the Emergency Management Act in Executive Order 2020-33 is terminated.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 30, 2020

Time: 7:29 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-67

Declaration of state of emergency under the Emergency Powers of the Governor Act, 1945 PA 302

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. The virus's rapid and relentless spread threatened to quickly overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals. And the virus had also brought deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow

the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I have issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I have also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I have taken steps to begin building the public health infrastructure in this state that is necessary to contain the infection.

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 41,379 confirmed cases of COVID-19 in Michigan, and 3,789 deaths from the disease—fourfold and tenfold increases, respectively, since the start of this month. And there are still countless more who are infected but have not yet been tested. There remains no treatment for the virus; it remains exceptionally easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster.

The economic and social harms from this pandemic likewise persist. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: to date, roughly one quarter of the eligible workforce has filed for unemployment. And state revenue, used to fund many essential services such as our schools, has dropped sharply.

The economic damage—already severe—will continue to compound with time. Between March 15 and April 18, Michigan had 1.2 million initial unemployment claims—the fifth-highest nationally, amounting to nearly 24% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression. On April 9, 2020, economists at the University of Michigan forecasted that the U.S. economy will contract by 7% in the second quarter of this year, or roughly an annualized rate of 25%. As a result, many families in

Michigan will struggle to pay their bills or even put food on the table.
So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Although local health departments have some limited capacity to respond to cases as they arise within their jurisdiction, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hotspots as they arise. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe.

Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work, which would undermine infection control and contribute to further spread of the virus. Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq., provides that "[d]uring times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state . . . the governor may proclaim a state of emergency and designate the area involved." MCL 10.31(1). The state of emergency ceases "upon declaration by the governor that the emergency no longer exists." MCL 10.31(2).

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. A state of emergency remains declared across the State of Michigan under the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

2. This order is effective immediately and continues through May 28, 2020 at 11:59 pm.

3. I will evaluate the continuing need for this order prior to its expiration.

4. Executive Order 2020-33 is rescinded and replaced. All previous orders that rested on Executive Order 2020-33 now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 30, 2020

Time: 7:30 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-68

Declaration of states of emergency and disaster under the Emergency Management Act, 1976 PA 390

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. The virus's rapid and relentless spread threatened to quickly overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals. And the virus had also brought deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow

the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I have issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I have also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I have taken steps to begin building the public health infrastructure in this state that is necessary to contain the infection.

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 41,379 confirmed cases of COVID-19 in Michigan, and 3,789 deaths from the disease—fourfold and tenfold increases, respectively, since the start of this month. And there are still countless more who are infected but have not yet been tested. There remains no treatment for the virus; it remains exceptionally easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit Southeast Michigan hardest, the disease is now increasing more quickly in other parts of the state. For instance, cases in some counties in Western and Northern Michigan are now doubling every 6 days or faster.

The economic and social harms from this pandemic likewise persist. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations. Michiganders are losing their jobs in record numbers: to date, roughly one quarter of the eligible workforce has filed for unemployment. And state revenue, used to fund many essential services such as our schools, has dropped sharply.

The economic damage—already severe—will continue to compound with time. Between March 15 and April 18, Michigan had 1.2 million initial unemployment claims—the fifth-highest nationally, amounting to nearly 24% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression. On April 9, 2020, economists at the

University of Michigan forecasted that the U.S. economy will contract by 7% in the second quarter of this year, or roughly an annualized rate of 25%. As a result, many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Although local health departments have some limited capacity to respond to cases as they arise within their jurisdiction, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hotspots as they arise. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe.

Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work, which would undermine infection control and contribute to further spread of the virus. Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Section 1 of article 5 of the Michigan Constitution of 1963 vests the executive power of the State of Michigan in the governor.

The Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., provides that "[t]he governor is responsible for coping with dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). In particular, the Emergency Management Act mandates that "[t]he governor shall, by executive order or proclamation, declare a state of emergency" and/or a "state of disaster" upon finding that an emergency and/or disaster has occurred or is threatening to occur. MCL 30.403(3) & (4). Under the Emergency Management Act, an emergency constitutes "any occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h). And a disaster constitutes "an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human-made cause, including, but not limited to, . . . epidemic." MCL 30.402(e).

Acting under the Michigan Constitution of 1963 and Michigan law:

1. I now declare a state of emergency and a state of disaster across the State of Michigan under the Emergency Management Act.

2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. This order is effective immediately and continues through May 28, 2020 at 11:59 pm.

4. I will evaluate the continuing need for this order prior to its expiration.

5. All previous orders that rested on Executive Order 2020-33 now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: April 30, 2020

Time: 7:30 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-96

Temporary requirement to suspend certain activities that are not necessary to sustain or protect life

Rescission of Executive Orders 2020-17, 2020-34, and 2020-92

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he

or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We can now start the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

With this order, I find it reasonable and necessary to reaffirm the measures set forth in Executive Order 2020-92, while also allowing gatherings of no more than ten people statewide, effective immediately, and permitting retailers and motor vehicle dealerships to see customers by appointment, beginning on May 26, 2020. In addition, because our health-care capacity has improved with respect to personal protective equipment, available beds, personnel, ventilators, and necessary supplies, I find it reasonable to rescind Executive Orders 2020-17 and 2020-34, which required health-care and veterinary facilities to implement plans to postpone some medical and dental procedures. Those rescissions will take effect on May 29.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. This order must be construed broadly to prohibit in-person work that is not necessary to sustain or protect life.

2. For purposes of this order, Michigan comprises eight separate regions:

   (a) Region 1 includes the following counties: Monroe, Washtenaw, Livingston, Genesee, Lapeer, Saint Clair, Oakland, Macomb, and Wayne.

   (b) Region 2 includes the following counties: Mason, Lake, Osceola, Clare, Oceana, Newaygo, Mecosta, Isabella, Muskegon, Montcalm, Ottawa, Kent, and Ionia.

   (c) Region 3 includes the following counties: Allegan, Barry, Van Buren, Kalamazoo, Calhoun, Berrien, Cass, Saint Joseph, and Branch.

(d) Region 4 includes the following counties: Oscoda, Alcona, Ogemaw, Iosco, Gladwin, Arenac, Midland, Bay, Saginaw, Tuscola, Sanilac, and Huron.

(e) Region 5 includes the following counties: Gratiot, Clinton, Shiawassee, Eaton, and Ingham.

(f) Region 6 includes the following counties: Manistee, Wexford, Missaukee, Roscommon, Benzie, Grand Traverse, Kalkaska, Crawford, Leelanau, Antrim, Otsego, Montmorency, Alpena, Charlevoix, Cheboygan, Presque Isle, and Emmet.

(g) Region 7 includes the following counties: Hillsdale, Lenawee, and Jackson.

(h) Region 8 includes the following counties: Gogebic, Ontonagon, Houghton, Keweenaw, Iron, Baraga, Dickinson, Marquette, Menominee, Delta, Alger, Schoolcraft, Luce, Mackinac, and Chippewa.

3. Subject to the exceptions in section 8 of this order, all individuals currently living within the State of Michigan are ordered to stay at home or at their place of residence. Subject to the same exceptions, all public and private gatherings of any number of people occurring among persons not part of a single household are prohibited.

4. All individuals who leave their home or place of residence must adhere to social distancing measures recommended by the Centers for Disease Control and Prevention ("CDC"), including remaining at least six feet from people from outside the individual's household to the extent feasible under the circumstances.

5. No person or entity shall operate a business or conduct operations that require workers to leave their homes or places of residence except to the extent that those workers are necessary to sustain or protect life, to conduct minimum basic operations, or to perform a resumed activity within the meaning of this order.

(a) For purposes of this order, workers who are necessary to sustain or protect life are defined as "critical infrastructure workers," as described in sections 9 and 10 of this order.

(b) For purposes of this order, workers who are necessary to conduct minimum basic operations are those whose in-person presence is strictly necessary to allow the business or operation to maintain the value of inventory and equipment, care for animals, ensure security, process transactions (including payroll and employee benefits), or facilitate the ability of other workers to work remotely.

Businesses and operations must determine which of their workers are necessary to conduct minimum basic operations and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work.

Any in-person work necessary to conduct minimum basic operations must be performed consistently with the social distancing practices and other mitigation measures described in Executive Order 2020-97 and any orders that may follow from it.

(c) Workers who perform resumed activities are defined in section 11 of this order.

6. Businesses and operations that employ critical infrastructure workers or workers who perform resumed activities may continue in-person operations, subject to the following conditions:

(a) Consistent with sections 9, 10, and 11 of this order, businesses and operations must determine which of their workers are critical infrastructure workers or workers who perform resumed activities and inform such workers of that designation. Businesses and operations must make such designations in writing, whether by electronic message, public website, or other appropriate means. Workers need not carry copies of their designations when they leave the home or place of residence for work. Businesses and operations need not designate:

(1) Workers in health care and public health.

(2) Workers who perform necessary government activities, as described in section 7 of this order.

(3) Workers and volunteers described in section 10(d) of this order.

(b) In-person activities that are not necessary to sustain or protect life or to perform a resumed activity must be suspended.

(c) Businesses and operations maintaining in-person activities must adopt social distancing practices and other mitigation measures to protect workers and patrons, as described in Executive Order 2020-97 and any orders that may follow from it.

(d) Any business or operation that employs workers who perform resumed activities under section 11(a) of this order, but that does not sell necessary supplies, may sell any goods through remote sales via delivery or at the curbside. Such a business or operation, however, must otherwise remain closed to the public.

7. All in-person government activities at whatever level (state, county, or local) are suspended unless:

(a) They are performed by critical infrastructure workers, including workers in law enforcement, public safety, and first responders, as defined in sections 9 and 10 of this order.

(b) They are performed by workers who are permitted to resume work under section 11 of this order.

(c) They are necessary to support the activities of workers described in sections 9, 10, and 11 of this order, or to enable transactions that support businesses or operations that employ such workers.

(d) They involve public transit, trash pick-up and disposal (including recycling and composting), the management and oversight of elections, and the maintenance of safe and sanitary public parks so as to allow for outdoor activity permitted under this order.

(e) For purposes of this order, necessary government activities include minimum basic operations, as described in 5(b) of this order. Workers performing such activities need not be designated.

(f) Any in-person government activities must be performed consistently with the social distancing practices and other mitigation measures to protect workers and patrons described in Executive Order 2020-97 and any orders that may follow from it.

8. Exceptions.

(a) Individuals may leave their home or place of residence, and travel as necessary:

(1) To engage in outdoor recreational activity, consistent with remaining at least six feet from people from outside the individual's household. Outdoor recreational activity includes walking, hiking, running, cycling, boating, golfing, or other similar activity, as well as any comparable activity for those with limited mobility.

(2) To perform their jobs as critical infrastructure workers after being so designated by their employers. (Critical infrastructure workers who need not be designated under section 6(a) of this order may leave their home for work without being designated.)

(3) To conduct minimum basic operations, as described in section 5(b) of this order, after being designated to perform such work by their employers.

(4) To perform resumed activities, as described in section 11 of this order, after being designated to perform such work by their employers.

(5) To perform necessary government activities, as described in section 7 of this order.

(6) To perform tasks that are necessary to their health and safety, or to the health and safety of their family or household members (including pets). Individuals may, for example, leave the home or place of residence to secure medication or to seek medical or dental care for themselves or a household or family member.

(7) To obtain necessary services or supplies for themselves, their family or household members, their pets, and their motor vehicles.

(A) Individuals must secure such services or supplies via delivery to the maximum extent possible. As needed, however, individuals may leave the home or place of residence to purchase groceries, take-out food, gasoline, needed medical supplies, and any other products necessary to maintain the safety, sanitation, and basic operation of their residences or motor vehicles.

(B) Individuals may also leave the home to pick up or return a motor vehicle as permitted under section 10(i) of this order, or to go to a motor vehicle dealership showroom by appointment, as permitted under section 11(p) of this order.

(C) Individuals may leave the home to have a bicycle repaired or maintained.

(D) Individuals should limit, to the maximum extent that is safe and feasible, the number of household members who leave the home for any errands.

(8) To pick up non-necessary supplies at the curbside from a store that must otherwise remain closed to the public.

(9) To care for a family member or a family member's pet in another household.

(10) To care for minors, dependents, the elderly, persons with disabilities, or other vulnerable persons.

(11) To visit an individual under the care of a health care facility, residential care facility, or congregate care facility, to the extent otherwise permitted.

(12) To visit a child in out-of-home care, or to facilitate a visit between a parent and a child in out-of-home care, when there is agreement between the child placing agency, the parent, and the caregiver about a safe visitation plan, or when, failing such agreement, the individual secures an exception from the executive director of the Children's Services Agency.

(13) To attend legal proceedings or hearings for essential or emergency purposes as ordered by a court.

(14) To work or volunteer for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(15) To attend a funeral, provided that no more than 10 people are in attendance.

(16) To attend a meeting of an addiction recovery mutual aid society, provided that no more than 10 people are in attendance.

(17) To view a real-estate listing by appointment, as permitted under section 11(g) of this order.

(18) To participate in training, credentialing, or licensing activities permitted under section 11(i) of this order.

(19) For individuals in Regions 6 or 8, to go to a restaurant or a retail store.

(20) To go to a retail store by appointment, as permitted under section 11(q) of this order.

(21) To attend a social gathering of no more than 10 people.

(b) Individuals may also travel:

(1) To return to a home or place of residence from outside this state.

(2) To leave this state for a home or residence elsewhere.

(3) Between two residences in this state, including moving to a new residence.

(4) As required by law enforcement or a court order, including the transportation of children pursuant to a custody agreement.

(c) All other travel is prohibited, including all travel to vacation rentals.

9. For purposes of this order, critical infrastructure workers are those workers described by the Director of the U.S. Cybersecurity and Infrastructure Security Agency in his guidance of March 19, 2020 on the COVID-19 response (available here). This order does *not* adopt any subsequent guidance document released by this same agency.

Consistent with the March 19, 2020 guidance document, critical infrastructure workers include some workers in each of the following sectors:

(a) Health care and public health.

(b) Law enforcement, public safety, and first responders.

(c) Food and agriculture.

(d) Energy.

(e) Water and wastewater.

(f) Transportation and logistics.

(g) Public works.

(h) Communications and information technology, including news media.

(i) Other community-based government operations and essential functions.

(j) Critical manufacturing.

(k) Hazardous materials.

(l) Financial services.

(m) Chemical supply chains and safety.

(n) Defense industrial base.

10. For purposes of this order, critical infrastructure workers also include:

(a) Child care workers (including workers at disaster relief child care centers), but only to the extent necessary to serve the children or dependents of critical infrastructure workers, workers who conduct minimum basic operations, workers who perform necessary government activities, or workers who perform resumed activities. This category includes individuals (whether licensed or not) who have arranged to care for the children or dependents of such workers.

(b) Workers at suppliers, distribution centers, or service providers, as described below.

(1) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate another business's or operation's critical infrastructure work may designate their workers as critical infrastructure workers, provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

(2) Any suppliers, distribution centers, or service providers whose continued operation is necessary to enable, support, or facilitate the necessary work of suppliers, distribution centers, or service providers described in sub-provision (1) of this subsection may designate their workers as critical infrastructure workers provided that only those workers whose in-person presence is necessary to enable, support, or facilitate such work may be so designated.

(3) Consistent with the scope of work permitted under sub-provision (2) of this subsection, any suppliers, distribution centers, or service providers further down the supply chain whose continued operation is necessary to enable, support, or facilitate the necessary work of other suppliers, distribution centers, or service providers may likewise designate their workers as critical infrastructure workers, provided that only those workers whose in-person

presence is necessary to enable, support, or facilitate such work may be so designated.

(4) Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

(c) Workers in the insurance industry, but only to the extent that their work cannot be done by telephone or remotely.

(d) Workers and volunteers for businesses or operations (including both religious and secular nonprofit organizations) that provide food, shelter, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities.

(e) Workers who perform critical labor union functions, including those who administer health and welfare funds and those who monitor the well-being and safety of union members who are critical infrastructure workers, provided that any administration or monitoring should be done by telephone or remotely where possible.

(f) Workers at retail stores who sell groceries, medical supplies, and products necessary to maintain the safety, sanitation, and basic operation of residences or motor vehicles, including convenience stores, pet supply stores, auto supplies and repair stores, hardware and home maintenance stores, and home appliance retailers.

(g) Workers at laundromats, coin laundries, and dry cleaners.

(h) Workers at hotels and motels, provided that the hotels or motels do not offer additional in-house amenities such as gyms, pools, spas, dining, entertainment facilities, meeting rooms, or like facilities.

(i) Workers at motor vehicle dealerships who are necessary to facilitate remote and electronic sales or leases, or to deliver motor vehicles to customers, provided that showrooms remain closed to in-person traffic until May 26, 2020 at 12:01 am.

11. For purposes of this order, workers who perform resumed activities are defined as follows:

(a) Workers who process or fulfill remote orders for goods for delivery or curbside pick-up.

(b) Workers who perform bicycle maintenance or repair.

(c) Workers for garden stores, nurseries, and lawn care, pest control, and landscaping operations.

(d) Workers for moving or storage operations.

(e) Workers who perform work that is traditionally and primarily performed outdoors, including but not limited to forestry workers, outdoor power equipment technicians, parking enforcement workers, and outdoor workers at places of outdoor recreation not otherwise closed under Executive Order 2020-69 or any order that may follow from it.

(f) Workers in the construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers).

(g) Workers in the real-estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, provided that:

(1) Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time. No in-person open houses are permitted.

(2) Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.

(h) Workers necessary to the manufacture of goods that support workplace modification to forestall the spread of COVID-19 infections.

(i) Workers necessary to train, credential, and license first responders (e.g., police officers, fire fighters, paramedics) and health-care workers, including certified nursing assistants, provided that as much instruction as possible is provided remotely.

(j) Workers necessary to perform manufacturing activities. Manufacturing work may not commence under this subsection until the facility at which the work will be performed has been prepared to follow the workplace safeguards described in section 4 of Executive Order 2020-97 and any orders that may follow from it.

(k) Workers necessary to conduct research activities in a laboratory setting.

(l) For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers necessary to perform retail activities. For purposes of this order, retail activities are defined:

(1) As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).

(2) To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.

(m) For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers who work

in an office setting, but only to the extent that such work is not capable of being performed remotely.

(n) For Regions 6 and 8, beginning at 12:01 am on May 22, 2020, workers in restaurants or bars, subject to the capacity constraints and workplace standards described in Executive Order 2020-97. Nothing in this subsection should be taken to abridge or otherwise modify the existing power of a local government to impose further restrictions on restaurants or bars. For restaurants and bars subject to this subsection, this subsection supersedes the limitations placed on those restaurants and bars by Executive Order 2020-69 and any order that may follow from it.

(o) Workers necessary to prepare a workplace to follow the workplace standards described in Executive Order 2020-97 and to otherwise ready the workplace for reopening.

(p) Beginning at 12:01 am on May 26, 2020, workers at motor vehicle dealerships, provided that showrooms are open only by appointment.

(q) Beginning at 12:01 am on May 26, 2020, workers necessary to perform retail activities by appointment, provided that the store is limited to 10 customers at any one time. For purposes of this order, retail activities are defined:

(1) As the selling of goods and the rendering of services incidental to the sale of the goods (e.g., any packaging and processing to allow for or facilitate the sale and delivery of the goods).

(2) To exclude those places of public accommodation that are closed under Executive Order 2020-69 and any orders that may follow from it.

(r) Consistent with section 10(b) of this order, workers at suppliers, distribution centers, or service providers whose in-person presence is necessary to enable, support, or facilitate another business's or operation's resumed activities, including workers at suppliers, distribution centers, or service providers along the supply chain whose in-person presence is necessary to enable, support, or facilitate the necessary work of another supplier, distribution center, or service provider in enabling, supporting, or facilitating another business's or operation's resumed activities. Suppliers, distribution centers, and service providers that abuse their designation authority under this subsection shall be subject to sanctions to the fullest extent of the law.

12. Any store that is open for in-store sales under section 10(f), section 11(c), or section 11(q) of this executive order:

(a) May continue to sell goods other than necessary supplies if the sale of such goods is in the ordinary course of business.

(b) Must consider establishing curbside pick-up to reduce in-store traffic and mitigate outdoor lines.

13. No one shall rent a short-term vacation property except as necessary to assist in housing a health care professional aiding in the response to the COVID-19 pandemic or a volunteer who is aiding the same.

14. Michigan state parks remain open for day use, subject to any reductions in services and specific closures that, in the judgment of the director of the Department of Natural Resources, are necessary to minimize large gatherings and to prevent the spread of COVID-19.

15. Rules governing face coverings.

    (a) Except as provided in subsection (b) of this section, any individual able to medically tolerate a face covering must wear a covering over his or her nose and mouth—such as a homemade mask, scarf, bandana, or handkerchief—when in any enclosed public space.

    (b) An individual may be required to temporarily remove a face covering upon entering an enclosed public space for identification purposes. An individual may also remove a face covering while seated at a restaurant or bar.

    (c) All businesses and operations whose workers perform in-person work must, at a minimum, provide non-medical grade face coverings to their workers.

    (d) Supplies of N95 masks and surgical masks should generally be reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers who interact with the public.

    (e) The protections against discrimination in the Elliott-Larsen Civil Rights Act, 1976 PA 453, as amended, MCL 37.2101 et seq., and any other protections against discrimination in Michigan law, apply in full force to individuals who wear a face covering under this order.

16. Except as otherwise expressly stated in this order, nothing in this order should be taken to supersede another executive order or directive that is in effect, except to the extent this order imposes more stringent limitations on in-person work, activities, and interactions. Consistent with prior guidance, neither a place of religious worship nor its owner is subject to penalty under section 22 of this order for allowing religious worship at such place. No individual is subject to penalty under section 22 of this order for engaging in or traveling to engage in religious worship at a place of religious worship, or for violating section 15(a) of this order.

17. Nothing in this order should be taken to interfere with or infringe on the powers of the legislative and judicial branches to perform their constitutional duties or exercise their authority. Similarly, nothing in this order shall be taken to abridge protections guaranteed by the state or federal constitution under these emergency circumstances.

18. This order takes effect immediately, unless otherwise specified in this order, and

continues through May 28, 2020 at 11:59 pm.

19. Executive Order 2020-17, which imposed temporary requirements regarding the postponement of non-essential medical and dental procedures, is rescinded as of May 28, 2020 at 11:59 pm. Executive Order 2020-34, which imposed temporary requirements regarding the postponement of veterinary services, is rescinded as of May 28, 2020 at 11:59 pm. Outpatient health-care facilities, including veterinary offices, are subject to the workplace safety rules described in Executive Order 2020-97.

20. Executive Orders 2020-92 is rescinded. All references to that order in other executive orders, agency rules, letters of understanding, or other legal authorities shall be taken to refer to this order.

21. I will evaluate the continuing need for this order prior to its expiration. In determining whether to maintain, intensify, or relax its restrictions, I will consider, among other things, (1) data on COVID-19 infections and the disease's rate of spread; (2) whether sufficient medical personnel, hospital beds, and ventilators exist to meet anticipated medical need; (3) the availability of personal protective equipment for the health care workforce; (4) the state's capacity to test for COVID-19 cases and isolate infected people; and (5) economic conditions in the state.

22. Consistent with MCL 10.33 and MCL 30.405(3), a willful violation of this order is a misdemeanor.

Given under my hand and the Great Seal of the State of Michigan.

Date: May 21 2020

Time: 9:49 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-97

Safeguards to protect Michigan's workers from COVID-19

Rescission of Executive Order 2020-91

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, "the governor may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, to establish the public health infrastructure necessary to contain the spread of infection, and to avoid needless deaths, it is reasonable and necessary to direct residents to remain at home or in their place of residence to the maximum extent feasible. To that end, on March 23, 2020, I issued Executive Order 2020-21, ordering all people in Michigan to stay home and stay safe. In Executive Orders 2020-42, 2020-59, 2020-70, 2020-77, and 2020-92, I extended that initial order, modifying its scope as needed and appropriate to match the ever-changing circumstances presented by this pandemic.

The measures put in place by these executive orders have been effective: the number of new confirmed cases each day has started to drop. Although the virus remains aggressive and persistent—on May 20, 2020, Michigan reported 53,009 confirmed cases and 5,060 deaths—the strain on our health care system has begun to relent, even as our testing capacity has increased. We have now begun the process of gradually resuming in-person work and activities that were temporarily suspended under my prior orders. In so doing, however, we must move with care, patience, and vigilance, recognizing the grave harm that this virus continues to inflict on our state and how quickly our progress in suppressing it can be undone.

In particular, businesses must do their part to protect their employees, their patrons, and their communities. Many businesses have already done so by implementing robust safeguards to prevent viral transmission. But we can and must do more: no one should feel unsafe at work. With Executive Order 2020-91, I created an enforceable set of workplace standards that apply to all businesses across the state. I am now amending those standards to include new provisions governing outpatient health-care facilities.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. All businesses or operations that are permitted to require their employees to leave the homes or residences for work under Executive Order 2020-92, and any order that follows it, must, at a minimum:

   (a) Develop a COVID-19 preparedness and response plan, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration and available here. By June 1, 2020, or within two weeks of resuming in-person activities, whichever is later, a business's or operation's plan must be made readily available to employees, labor unions, and customers, whether via website, internal network, or by hard copy.

   (b) Designate one or more worksite supervisors to implement, monitor, and report on the COVID-19 control strategies developed under subsection (a). The supervisor must remain on-site at all times when employees are present on site. An on-site employee may be designated to perform the supervisory role.

   (c) Provide COVID-19 training to employees that covers, at a minimum:

(1) Workplace infection-control practices.

(2) The proper use of personal protective equipment.

(3) Steps the employee must take to notify the business or operation of any symptoms of COVID-19 or a suspected or confirmed diagnosis of COVID-19.

(4) How to report unsafe working conditions.

(d) Conduct a daily entry self-screening protocol for all employees or contractors entering the workplace, including, at a minimum, a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19.

(e) Keep everyone on the worksite premises at least six feet from one another to the maximum extent possible, including through the use of ground markings, signs, and physical barriers, as appropriate to the worksite.

(f) Provide non-medical grade face coverings to their employees, with supplies of N95 masks and surgical masks reserved, for now, for health care professionals, first responders (e.g., police officers, fire fighters, paramedics), and other critical workers.

(g) Require face coverings to be worn when employees cannot consistently maintain six feet of separation from other individuals in the workplace, and consider face shields when employees cannot consistently maintain three feet of separation from other individuals in the workplace.

(h) Increase facility cleaning and disinfection to limit exposure to COVID-19, especially on high-touch surfaces (e.g., door handles), paying special attention to parts, products, and shared equipment (e.g., tools, machinery, vehicles).

(i) Adopt protocols to clean and disinfect the facility in the event of a positive COVID-19 case in the workplace.

(j) Make cleaning supplies available to employees upon entry and at the worksite and provide time for employees to wash hands frequently or to use hand sanitizer.

(k) When an employee is identified with a confirmed case of COVID-19, within 24 hours, notify both:

(1) The local public health department, and

(2) Any co-workers, contractors, or suppliers who may have come into contact with the person with a confirmed case of COVID-19.

(l) An employer will allow employees with a confirmed or suspected case of COVID-19 to return to the workplace only after they are no longer infectious according to

the latest guidelines from the Centers for Disease Control and Prevention ("CDC").

(m) Follow Executive Order 2020-36, and any executive orders that follow it, that prohibit discharging, disciplining, or otherwise retaliating against employees who stay home or who leave work when they are at particular risk of infecting others with COVID-19.

(n) Establish a response plan for dealing with a confirmed infection in the workplace, including protocols for sending employees home and for temporary closures of all or part of the worksite to allow for deep cleaning.

(o) Restrict business-related travel for employees to essential travel only.

(p) Encourage employees to use personal protective equipment and hand sanitizer on public transportation.

(q) Promote remote work to the fullest extent possible.

(r) Adopt any additional infection-control measures that are reasonable in light of the work performed at the worksite and the rate of infection in the surrounding community.

2. Businesses or operations whose work is primarily and traditionally performed outdoors must:

(a) Prohibit gatherings of any size in which people cannot maintain six feet of distance from one another.

(b) Limit in-person interaction with clients and patrons to the maximum extent possible, and bar any such interaction in which people cannot maintain six feet of distance from one another.

(c) Provide and require the use of personal protective equipment such as gloves, goggles, face shields, and face coverings, as appropriate for the activity being performed.

(d) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible and to ensure frequent and thorough cleaning and disinfection of tools, equipment, and frequently touched surfaces.

3. Businesses or operations in the construction industry must:

(a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

(b) Create dedicated entry point(s) at every worksite, if possible, for daily screening as provided in sub-provision (b) of this section, or in the alternative issue stickers or other indicators to employees to show that they received a screening before entering the worksite that day.

(c) Provide instructions for the distribution of personal protective equipment and designate on-site locations for soiled face coverings.

(d) Require the use of work gloves where appropriate to prevent skin contact with contaminated surfaces.

(e) Identify choke points and high-risk areas where employees must stand near one another (such as hallways, hoists and elevators, break areas, water stations, and buses) and control their access and use (including through physical barriers) so that social distancing is maintained.

(f) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees.

(g) Notify contractors (if a subcontractor) or owners (if a contractor) of any confirmed COVID-19 cases among employees at the worksite.

(h) Restrict unnecessary movement between project sites.

(i) Create protocols for minimizing personal contact upon delivery of materials to the worksite.

4. Manufacturing facilities must:

(a) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering the facility, including a questionnaire covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with temperature screening as soon as no-touch thermometers can be obtained.

(b) Create dedicated entry point(s) at every facility for daily screening as provided in sub-provision (a) of this section, and ensure physical barriers are in place to prevent anyone from bypassing the screening.

(c) Suspend all non-essential in-person visits, including tours.

(d) Train employees on, at a minimum:

(1) Routes by which the virus causing COVID-19 is transmitted from person to person.

(2) Distance that the virus can travel in the air, as well as the time it remains viable in the air and on environmental surfaces.

(3) The use of personal protective equipment, including the proper steps for putting it on and taking it off.

(e) Reduce congestion in common spaces wherever practicable by, for example, closing salad bars and buffets within cafeterias and kitchens, requiring individuals to sit at least six feet from one another, placing markings on the floor to allow social distancing while standing in line, offering boxed food via delivery or pick-up points, and reducing cash payments.

(f) Implement rotational shift schedules where possible (e.g., increasing the number of shifts, alternating days or weeks) to reduce the number of employees in the facility at the same time.

(g) Stagger meal and break times, as well as start times at each entrance, where possible.

(h) Install temporary physical barriers, where practicable, between work stations and cafeteria tables.

(i) Create protocols for minimizing personal contact upon delivery of materials to the facility.

(j) Adopt protocols to limit the sharing of tools and equipment to the maximum extent possible.

(k) Ensure there are sufficient hand-washing or hand-sanitizing stations at the worksite to enable easy access by employees, and discontinue use of hand dryers.

(l) Notify plant leaders and potentially exposed individuals upon identification of a positive case of COVID-19 in the facility, as well as maintain a central log for symptomatic employees or employees who received a positive test for COVID-19.

(m) Send potentially exposed individuals home upon identification of a positive case of COVID-19 in the facility.

(n) Require employees to self-report to plant leaders as soon as possible after developing symptoms of COVID-19.

(o) Shut areas of the manufacturing facility for cleaning and disinfection, as necessary, if an employee goes home because he or she is displaying symptoms of COVID-19.

5. Research laboratories, but not laboratories that perform diagnostic testing, must:

(a) Assign dedicated entry point(s) and/or times into lab buildings.

(b) Conduct a daily entry screening protocol for employees, contractors, suppliers, and any other individuals entering a worksite, including a questionnaire

covering symptoms and suspected or confirmed exposure to people with possible COVID-19, together with, if possible, a temperature screening.

(c) Create protocols and/or checklists as necessary to conform to the facility's COVID-19 preparedness and response plan under section 1(a).

(d) Suspend all non-essential in-person visitors (including visiting scholars and undergraduate students) until further notice.

(e) Establish and implement a plan for distributing face coverings.

(f) Limit the number of people per square feet of floor space permitted in a particular laboratory at one time.

(g) Close open workspaces, cafeterias, and conference rooms.

(h) As necessary, use tape on the floor to demarcate socially distanced workspaces and to create one-way traffic flow.

(i) Require all office and dry lab work to be conducted remotely.

(j) Minimize the use of shared lab equipment and shared lab tools and create protocols for disinfecting lab equipment and lab tools.

(k) Provide disinfecting supplies and require employees to wipe down their work stations at least twice daily.

(l) Implement an audit and compliance procedure to ensure that cleaning criteria are followed.

(m) Establish a clear reporting process for any symptomatic individual or any individual with a confirmed case of COVID-19, including the notification of lab leaders and the maintenance of a central log.

(n) Clean and disinfect the work site when an employee is sent home with symptoms or with a confirmed case of COVID-19.

(o) Send any potentially exposed co-workers home if there is a positive case in the facility.

(p) Restrict all non-essential work travel, including in-person conference events.

6. Retail stores that are open for in-store sales must:

(a) Create communications material for customers (e.g., signs or pamphlets) to inform them of changes to store practices and to explain the precautions the store is taking to prevent infection.

(b) Establish lines to regulate entry in accordance with subsection (c) of this section, with markings for patrons to enable them to stand at least six feet apart from one another while waiting. Stores should also explore alternatives to lines, including by allowing customers to wait in their cars for a text message or phone call, to enable social distancing and to accommodate seniors and those with disabilities.

(c) Adhere to the following restrictions:

(1) For stores of less than 50,000 square feet of customer floor space, must limit the number of people in the store (including employees) to 25% of the total occupancy limits established by the State Fire Marshal or a local fire marshal. Stores of more than 50,000 square feet must:

(A) Limit the number of customers in the store at one time (excluding employees) to 4 people per 1,000 square feet of customer floor space.

(B) Create at least two hours per week of dedicated shopping time for vulnerable populations, which for purposes of this order are people over 60, pregnant women, and those with chronic conditions like heart disease, diabetes, and lung disease.

(2) The director of the Department of Health and Human Services is authorized to issue an emergency order varying the capacity limits described in this subsection as necessary to protect the public health.

(d) Post signs at store entrance(s) instructing customers of their legal obligation to wear a face covering when inside the store.

(e) Post signs at store entrance(s) informing customers not to enter if they are or have recently been sick.

(f) Design spaces and store activities in a manner that encourages employees and customers to maintain six feet of distance from one another.

(g) Install physical barriers at checkout or other service points that require interaction, including plexiglass barriers, tape markers, or tables, as appropriate.

(h) Establish an enhanced cleaning and sanitizing protocol for high-touch areas like restrooms, credit-card machines, keypads, counters, shopping carts, and other surfaces.

(i) Train employees on:

(1) Appropriate cleaning procedures, including training for cashiers on cleaning between customers.

(2) How to manage symptomatic customers upon entry or in the store.

(j) Notify employees if the employer learns that an individual (including a customer or supplier) with a confirmed case of COVID-19 has visited the store.

(k) Limit staffing to the minimum number necessary to operate.

7. Offices must:

(a) Assign dedicated entry point(s) for all employees to reduce congestion at the main entrance.

(b) Provide visual indicators of appropriate spacing for employees outside the building in case of congestion.

(c) Take steps to reduce entry congestion and to ensure the effectiveness of screening (e.g., by staggering start times, adopting a rotational schedule in only half of employees are in the office at a particular time).

(d) Require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.

(e) Increase distancing between employees by spreading out workspaces, staggering workspace usage, restricting non-essential common space (e.g., cafeterias), providing visual cues to guide movement and activity (e.g., restricting elevator capacity with markings, locking conference rooms).

(f) Turn off water fountains.

(g) Prohibit social gatherings and meetings that do not allow for social distancing or that create unnecessary movement through the office.

(h) Provide disinfecting supplies and require employees wipe down their work stations at least twice daily.

(i) Post signs about the importance of personal hygiene.

(j) Disinfect high-touch surfaces in offices (e.g., whiteboard markers, restrooms, handles) and minimize shared items when possible (e.g., pens, remotes, whiteboards).

(k) Institute cleaning and communications protocols when employees are sent home with symptoms.

(l) Notify employees if the employer learns that an individual (including a customer, supplier, or visitor) with a confirmed case of COVID-19 has visited the office.

(m) Suspend all nonessential visitors.

(n) Restrict all non-essential travel, including in-person conference events.

8. Restaurants and bars must:

   (a) Limit capacity to 50% of normal seating.

   (b) Require six feet of separation between parties or groups at different tables or bar tops (e.g., spread tables out, use every other table, remove or put up chairs or barstools that are not in use).

   (c) Create communications material for customers (e.g., signs, pamphlets) to inform them of changes to restaurant or bar practices and to explain the precautions that are being taken to prevent infection.

   (d) Close waiting areas and ask customers to wait in cars for a call when their table is ready.

   (e) Close self-serve food or drink options, such as buffets, salad bars, and drink stations.

   (f) Provide physical guides, such as tape on floors or sidewalks and signage on walls to ensure that customers remain at least six feet apart in any lines.

   (g) Post sign(s) at store entrance(s) informing customers not to enter if they are or have recently been sick.

   (h) Post sign(s) instructing customers to wear face coverings until they get to their table.

   (i) Require hosts and servers to wear face coverings in the dining area.

   (j) Require employees to wear face coverings and gloves in the kitchen area when handling food, consistent with guidelines from the Food and Drug Administration ("FDA").

   (k) Limit shared items for customers (e.g., condiments, menus) and clean high-contact areas after each customer (e.g., tables, chairs, menus, payment tools, condiments).

   (l) Train employees on:

      (1) Appropriate use of personal protective equipment in conjunction with food safety guidelines.

      (2) Food safety health protocols (e.g., cleaning between customers, especially shared condiments).

      (3) How to manage symptomatic customers upon entry or in the restaurant.

(m) Notify employees if the employer learns that an individual (including an employee, customer, or supplier) with a confirmed case of COVID-19 has visited the store.

(n) Close restaurant immediately if an employee shows multiple symptoms of COVID-19 (fever, atypical shortness of breath, atypical cough) and perform a deep clean, consistent with guidance from the FDA and the CDC. Such cleaning may occur overnight.

(o) Install physical barriers, such as sneeze guards and partitions at cash registers, bars, host stands, and other areas where maintaining physical distance of six feet is difficult.

(p) To the maximum extent possible, limit the number of employees in shared spaces, including kitchens, break rooms, and offices, to maintain at least a six-foot distance between employees.

9. Outpatient health-care facilities, including clinics, primary care physician offices, or dental offices, and also including veterinary clinics, must:

(a) Post signs at entrance(s) instructing patients to wear a face covering when inside.

(b) Limit waiting-area occupancy to the number of individuals who can be present while staying six feet away from one another and ask patients, if possible, to wait in cars for their appointment to be called.

(c) Mark waiting rooms to enable six feet of social distancing (e.g., by placing X's on the ground and/or removing seats in the waiting room).

(d) Enable contactless sign-in (e.g., sign in on phone app) as soon as practicable.

(e) Add special hours for highly vulnerable patients, including the elderly and those with chronic conditions.

(f) Conduct a common screening protocol for all patients, including a temperature check and questions about COVID-19 symptoms.

(g) Place hand sanitizer and face coverings at patient entrance(s).

(h) Require employees to make proper use of personal protective equipment in accordance with guidance from the CDC and the U.S. Occupational Health and Safety Administration.

(i) Require patients to wear a face covering when in the facility, except as necessary for identification or to facilitate an examination or procedure.

(j) Install physical barriers at sign-in, temperature screening, or other service points that normally require personal interaction (e.g., plexiglass, cardboard, tables).

(k) Employ telehealth and telemedicine to the greatest extent possible.

(l) Limit the number of appointments to maintain social distancing and allow adequate time between appointments for cleaning.

(m) Employ specialized procedures for patients with high temperatures or respiratory symptoms (e.g., special entrances, having them wait in their car) to avoid exposing other patients in the waiting room.

(n) Deep clean examination rooms after patients with respiratory symptoms and clean rooms between all patients.

(o) Establish procedures for building disinfection in accordance with CDC guidance if it is suspected that an employee or patient has COVID-19 or if there is a confirmed case.

10. Employers must maintain a record of the requirements set forth in Sections 1(c), (d), and (k).

11. The rules described in sections 1 through 10 have the force and effect of regulations adopted by the departments and agencies with responsibility for overseeing compliance with workplace health-and-safety standards and are fully enforceable by such agencies. Any challenge to penalties imposed by a department or agency for violating any of the rules described in sections 1 through 10 of this order will proceed through the same administrative review process as any challenge to a penalty imposed by the department or agency for a violation of its rules.

12. Any business or operation that violates the rules in sections 1 through 10 has failed to provide a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to an employee, within the meaning of the Michigan Occupational Safety and Health Act, MCL 408.1011.

13. Nothing in this order shall be taken to limit or affect any rights or remedies otherwise available under law.

Given under my hand and the Great Seal of the State of Michigan.

Date: May 21, 2020

Time: 9:49 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-99

Declaration of state of emergency and state of disaster related to the COVID-19 pandemic

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This new disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. Exactly one month later, this number had ballooned to 42,356 confirmed cases and 3,866 deaths from the disease—a tenfold increase in deaths. The virus's rapid and relentless spread threatened to overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

On April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings are likely to be appealed.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I have issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I have also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I have taken steps to begin building the public health infrastructure in this state that is necessary to contain the infection.

My administration has also moved quickly to mitigate the economic and social harms of this pandemic. Through my orders, we have placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions for families that cannot make their rent, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective, but the need for them—like the unprecedented crisis posed by this global pandemic—is far from over. Though its pace of growth has showed signs of slowing, the virus remains aggressive and persistent: to date, there have been 53,510 confirmed cases of COVID-19 in Michigan, and 5,129 deaths from the disease. There remains no treatment for the virus; it remains easy to transmit, passing from asymptomatic individuals and surviving on surfaces for days; and we still lack adequate means to fully test for it and trace its spread. COVID-19 remains present and pervasive in Michigan, and it stands ready to quickly undo our recent progress in slowing its spread. Indeed, while COVID-19 initially hit southeast Michigan hardest, the disease is now spreading more quickly in other parts of the state. For instance, cases in some counties in western and mid-Michigan are now doubling approximately every 10 days.

Michigan's Safer at Home orders have aimed to reduce the spread of COVID-19 within the state. As summer approaches, Michigan's more rural counties are beginning to see more out-of-town visitors. The residents of these rural counties are among the most vulnerable to COVID-19, with older populations and rates of chronic illness among the highest in the state. Twenty-one of Michigan's eighty-three counties—all rural—have a median age over 50, and nearly 30% of Michigan's rural population is 65 or older. These rural areas tend to be miles away from larger hospitals with the personnel, beds, and equipment to fight this virus.

The economic and social harms from this pandemic likewise persist. Michigan has experienced an uptick in individuals reaching out to domestic violence hotlines and many shelters across Michigan are already over capacity. Due to the pandemic and the responsive measures necessary to address it, businesses and government agencies have had to quickly and dramatically adjust how they work. Where working from home is not possible, businesses have closed or significantly restricted their normal operations.

The economic damage—already severe—will continue to compound with time. Between March 15 and May 13, Michigan had 1.8 million initial unemployment claims—the fifth-highest nationally, amounting to nearly 36% of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state has already reached its highest unemployment rate since the Great Depression (22.7% in April). Between March 15 and May 21, Michigan paid out over $7 billion in benefits to eligible Michiganders. The Michigan Department of Treasury predicts that this year the state will lose between $1 and $3 billion in revenue. As a result, local governments will struggle to provide essential services to their communities and many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. The closure of museums and theaters limits people's ability to enrich themselves through the arts. And curtailing gatherings has left many seeking new ways to connect with their community during these challenging times.

A second wave of COVID-19 cases continues to pose a deadly threat to the people of this state. As various sectors of Michigan's economy begin to reopen, we must be able to respond nimbly to new data about transmission and health risks of the virus. Over the past months, researchers have discovered that COVID-19 can attack not only the lungs, but also the heart, brain, kidneys, liver, and blood. While older individuals are at higher risk of contracting and dying from COVID-19, studies have shown that the disease may increase the severity of strokes in younger people.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. While the virus has afflicted some regions of the state more severely than others, the extent of the virus's spread, coupled with its elusiveness and its ease of transmission, render the virus difficult to contain and threaten the entirety of this state. Michigan's fatality rate from COVID-19 remains the highest among neighboring states and sits around three percentage points higher than the national average. The underlying health factors that contribute to the severity of COVID-19 in Michigan remain present, as does the disease.

Although local health departments have some limited capacity to respond to cases as they arise within their jurisdictions, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hot-spots as they emerge. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and

averting catastrophe. Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work.

Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan.

2. This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

3. This order is effective immediately and continues through June 19, 2020 at 11:59 pm. I will evaluate the continuing need for this order prior to its expiration.

4. Executive Orders 2020-67 and 2020-68 are rescinded. All previous orders that rested on those orders now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: May 22, 2020

Time: 4:49 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-127

Declaration of state of emergency and state of disaster related to the COVID-19 pandemic

Rescission of Executive Order 2020-99

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. Exactly one month later, this number had ballooned to 42,356 confirmed cases and 3,866 deaths from the disease—a tenfold increase in deaths. The virus's rapid spread threatened to overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

On April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order

2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings have been appealed; the Court of Appeals has ordered oral argument to be held in August.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I took steps to build the public health infrastructure in this state that is necessary to contain the spread of infection.

My administration also moved to mitigate the economic and social harms of this pandemic. Through my orders, we placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures have been effective. A report released by the Imperial College COVID-19 Response Team, for example, shows that my actions have significantly lowered the number of cases and deaths that would have occurred had the state done nothing.

With the steep reduction in our case counts, I have moved progressively in recent weeks to relax restrictions on business activities and daily life. On June 1, I announced that most of the state would move to Phase 4 of my Safe Start plan, thereby allowing retailers and restaurants to resume operations. Hair salons and other personal care services followed two weeks later. And on June 10, I moved the Upper Peninsula and the region surrounding Traverse City to Phase 5, allowing for the reopening of movie theaters, gyms, bowling alleys, and other businesses. If current trends persist, I hope to move the rest of the state to Phase 5 by July 4.

But this global pandemic is far from over. Though its pace of growth has slowed, the virus remains aggressive and persistent: to date, there have been 60,393 confirmed cases of COVID-19 in Michigan, and 5,792 deaths from the disease. There is still no treatment for the virus and it remains easy to transmit. A second wave poses an ongoing threat. States in

the South and West are already seeing sharp upticks in cases; just two days ago, Arizona, Florida, and Texas all reported record highs in their daily case counts. Michigan could easily join them if we relax our vigilance.

The concern is especially acute because Michigan's more rural counties will see an increasing number of out-of-town visitors this summer. The residents of these rural counties are among the most vulnerable to COVID-19, with older populations and rates of chronic illness among the highest in the state. Twenty-one of Michigan's eighty-three counties—all rural—have a median age over 50, and nearly 30% of Michigan's rural population is 65 or older. These rural areas tend to be miles away from larger hospitals with the personnel, beds, and equipment to fight this virus.

Whatever happens with COVID-19 in the future, the state has already suffered immense economic damage. Between March 15 and May 30, Michigan received 2.2 million initial unemployment claims—the fifth-highest nationally, amounting to more than a third of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state already saw its highest unemployment rate since the Great Depression (22.7% in April). Between March 15 and May 21, Michigan paid out over $7 billion in benefits to eligible Michiganders. The Michigan Department of Treasury predicts that this year the state will lose between $1 and $3 billion in revenue. As a result, local governments will be hard-pressed to provide essential services to their communities and many families in Michigan will struggle to pay their bills or even put food on the table.

So too will the pandemic continue to disrupt our homes and our educational, civic, social, and religious institutions. Transitioning almost overnight to a distance-learning environment has placed strain on educators, students, and parents alike. Performance and indoor sporting venues remain closed across most of the state, limiting people's ability to enrich themselves or interact with their community. And curtailing gatherings has left many seeking new ways to connect with their friends and families. Life will not be back to normal for some time to come.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. Though local health departments have some limited capacity to respond to cases as they arise within their jurisdictions, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hot-spots as they emerge. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe. Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work.

Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and

welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

With this order, Executive Order 2020-99 is rescinded.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan.

2. This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation and the possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

3. This order is effective immediately and continues through July 16, 2020 at 11:59 pm. I will evaluate the continuing need for this order.

4. Executive Order 2020-99 is rescinded. All previous orders that rested on that order now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: June 18, 2020

Time: 1:55 pm

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

GRETCHEN WHITMER
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GARLIN GILCHRIST
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-151

Declaration of state of emergency and state of disaster related to the COVID-19 pandemic

On March 10, 2020, I issued Executive Order 2020-4, which declared a state of emergency in Michigan to address the COVID-19 pandemic. This disease, caused by a novel coronavirus not previously identified in humans, can easily spread from person to person and can result in serious illness or death. There is currently no approved vaccine or antiviral treatment.

Scarcely three weeks later, the virus had spread across Michigan. As of April 1, 2020, the state had 9,334 confirmed cases of COVID-19 and 337 deaths from the disease, with many thousands more infected but not yet tested. Exactly one month later, this number had ballooned to 42,356 confirmed cases and 3,866 deaths from the disease—a tenfold increase in deaths. The virus's rapid spread threatened to overwhelm the state's health care system: hospitals in multiple counties were reportedly at or near capacity; medical personnel, supplies, and resources necessary to treat COVID-19 patients were in high demand but short supply; dormitories and a convention center were being converted to temporary field hospitals.

On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the state of Michigan. Like Executive Order 2020-4, this declaration was based on multiple independent authorities: section 1 of article 5 of the Michigan Constitution of 1963; the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq.; and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq. On April 7, 2020, the Michigan legislature adopted a concurrent resolution to extend the states of emergency and disaster declared under the Emergency Management Act until April 30, 2020.

On April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

Those executive orders have been challenged in *Michigan House of Representatives and Michigan Senate v Whitmer*. On May 21, 2020, the Court of Claims ruled that Executive Order 2020-67 is a valid exercise of authority under the Emergency Powers of the Governor Act but that Executive Order 2020-68 is not a valid exercise of authority under the Emergency Management Act. Both of those rulings have been appealed; the Court of Appeals has ordered oral argument to be held in August.

Since I first declared an emergency in response to this pandemic, my administration has taken aggressive measures to fight the spread of COVID-19, prevent the rapid depletion of this state's critical health care resources, and avoid needless deaths. The best way to slow the spread of the virus is for people to stay home and keep their distance from others. To that end, and in keeping with the recommendations of public health experts, I issued orders restricting access to places of public accommodation and school buildings, limiting gatherings and travel, and requiring workers who are not necessary to sustain or protect life to remain at home. I also issued orders enhancing the operational capacity and efficiency of health care facilities and operations, allowing health care professionals to practice to the full extent of their training regardless of licensure, and facilitating the delivery of goods, supplies, equipment, and personnel that are needed to combat this pandemic. And I took steps to build the public health infrastructure in this state that is necessary to contain the spread of infection.

My administration also moved to mitigate the economic and social harms of this pandemic. Through my orders, we placed strict rules on businesses to prevent price gouging, put a temporary hold on evictions, expanded eligibility for unemployment benefits, provided protections to workers who stay home when they or their close contacts are sick, and created a structure through which our schools can continue to provide their students with the highest level of educational opportunities possible under the difficult circumstances now before us.

These statewide measures were effective. A report released by the Imperial College COVID-19 Response Team, for example, showed that my actions significantly lowered the number of cases and deaths that would have occurred had the state done nothing. And while the virus remains aggressive and persistent—on July 13, Michigan reported a total of 69,722 confirmed cases and 6,075 deaths—the strain on our health care system has relented, even as our testing capacity has increased.

With the steep reduction in case counts, I moved progressively to relax restrictions on business activities and daily life. On June 1, I announced that most of the state would move to Phase 4 of my Safe Start plan, thereby allowing retailers and restaurants to resume operations. Hair salons and other personal care services followed two weeks later. And on June 10, I moved the Upper Peninsula and the region surrounding Traverse City to Phase 5, allowing for the reopening of movie theaters, gyms, bowling alleys, and other businesses.

Over the past three weeks, however, our progress in suppressing the pandemic has stalled. Every region in Michigan has seen an uptick in new cases, and daily case counts now exceed 20 cases per million in the Detroit, Lansing, Grand Rapids, and Kalamazoo regions. Positivity rates are creeping upward, moving from 2.8% to 3.4% over the past week. The increase in cases reflects a national trend: COVID-19 cases are growing in 39 states and in some are surging uncontrollably. Two days ago, for example, Florida recorded 15,300 new

cases in a single day, the highest one-day total for any state so far during the pandemic.

Michigan now faces an acute risk of a second wave, one that not only threatens lives but may also jeopardize the reopening of schools in the fall. In response, I have paused the reopening of our economy. Gyms and performance venues remain closed across most of the state, and large gatherings remain curtailed. At the same time, consistent with the accumulating evidence that COVID-19 often spreads via aerosolized droplets, I have adopted additional measures—including the closure of certain bars and a requirement that stores refuse entry and service to those without face coverings—to reduce the risk of spread in indoor spaces. Life will not be back to normal for some time to come.

In the meantime, the economic toll continues to mount. Between March 15 and May 30, Michigan received 2.2 million initial unemployment claims—the fifth-highest nationally, amounting to more than a third of the Michigan workforce. During this crisis, Michigan has often processed more unemployment claims in a single day than in the most painful week of the Great Recession, and the state already saw its highest unemployment rate since the Great Depression (22.7% in April). The Michigan Department of Treasury predicts that this year the state will lose between $1 and $3 billion in revenue. At the same time, continued federal support is by no means assured: unless it is renewed, for example, Congress's emergency infusion of money into the unemployment system will cease at the end of this month. Without that money, many families in Michigan will struggle to pay their bills or even put food on the table.

The health, economic, and social harms of the COVID-19 pandemic thus remain widespread and severe, and they continue to constitute a statewide emergency and disaster. Though local health departments have some limited capacity to respond to cases as they arise within their jurisdictions, state emergency operations are necessary to bring this pandemic under control in Michigan and to build and maintain infrastructure to stop the spread of COVID-19, trace infections, and quickly direct additional resources to hot-spots as they emerge. State assistance to bolster health care capacity and flexibility also has been, and will continue to be, critical to saving lives, protecting public health and safety, and averting catastrophe. Moreover, state disaster and emergency recovery efforts remain necessary not only to support Michiganders in need due to the economic effects of this pandemic, but also to ensure that the prospect of lost income does not impel workers who may be infected to report to work.

Statewide coordination of these efforts is crucial to creating a stable path to recovery. Until that recovery is underway, the economic and fiscal harms from this pandemic have been contained, and the threats posed by COVID-19 to life and the public health, safety, and welfare of this state have been neutralized, statewide disaster and emergency conditions will exist.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The COVID-19 pandemic constitutes a disaster and emergency throughout the State of Michigan.

2. This order constitutes a state of emergency declaration under the Emergency Powers of the Governor Act of 1945. Subject to the ongoing litigation, and the

possibility that current rulings may be overturned or otherwise altered on appeal, and to the extent the governor may declare a state of emergency and a state of disaster under the Emergency Management Act of 1976 when emergency and disaster conditions exist yet the legislature has not granted an extension request, this order constitutes a state of emergency and state of disaster declaration under that act.

3. This order is effective immediately and continues through August 11, 2020 at 11:59 pm. I will evaluate the continuing need for this order.

4. Executive Order 2020-127 is rescinded. All previous orders that rested on that order now rest on this order.

Given under my hand and the Great Seal of the State of Michigan.

Date: July 14, 2020

Time: 2:54 am

GRETCHEN WHITMER
GOVERNOR

By the Governor:

SECRETARY OF STATE

2020 WL 3480841
United States Court of Appeals, Ninth Circuit.

State of CALIFORNIA; State of Colorado; State of Connecticut; State of Delaware; State of Hawaii; State of Maine; State of Minnesota; State of New Jersey; State of New Mexico; State of Nevada; State of New York; State of Oregon; Commonwealth of Virginia; State of Illinois; State of Maryland; Dana Nessel, Attorney General, on Behalf of the People of Michigan; State of Wisconsin; State of Massachusetts; State of Vermont; State of Rhode Island, Plaintiffs-Appellees,

v.

Donald J. TRUMP, in his official capacity as President of the United States of America; United States of America; United States Department of Defense; Mark T. Esper, in his official capacity as Acting Secretary of Defense; Ryan D. McCarthy, senior official performing the duties of the Secretary of the Army; Richard V. Spencer, in his official capacity as Secretary of the Navy; Heather Wilson, in her official capacity as Secretary of the Air Force; United States Department of the Treasury; Steven Terner Mnuchin, in his official capacity as Secretary of the Department of the Treasury; U.S. Department of the Interior; David Bernhardt, in his official capacity as Secretary of the Interior; U.S. Department of Homeland Security; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security, Defendants-Appellants.

State of California; State of New Mexico, Plaintiffs-Appellants,

v.

Donald J. Trump, in his official capacity as President of the United States of America; United States of America; United States Department of Defense; Mark T. Esper, in his official capacity as Acting Secretary of Defense; Ryan D. McCarthy, senior official performing the duties of the Secretary of the Army; Richard V. Spencer, in his official capacity as Secretary of the Navy; Heather Wilson, in her official capacity as Secretary of the Air Force; United States Department of the Treasury; Steven Terner Mnuchin, in his official capacity as Secretary of the Department of the Treasury; U.S. Department of the Interior; David Bernhardt, in his official capacity as Secretary of the Interior; U.S. Department of Homeland Security; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security, Defendants-Appellees.

No. 19-16299, No. 19-16336
|
Argued and Submitted November 12, 2019 San Francisco, California
|
Filed June 26, 2020

Synopsis

Background: Coalition of states brought action against President of United States and various Executive Branch officials, challenging diversion of federal funds for construction of physical barrier along United States' southern border with Mexico. The United States District Court for the Northern District of California, No. 19-cv-00872-HSG, Haywood S. Gilliam, J., 379 F.Supp.3d 928, entered partial summary for states and issued declaratory relief, but denied their motions for preliminary or permanent injunction. Defendants appealed.

Holdings: The Court of Appeals, Thomas, Chief Judge, held that:

states alleged requisite "injuries in fact" to possess Article III standing to bring action;

injuries in fact were "fairly traceable" to defendants' decision to redirect federal funds for construction of barrier, as required for Article III standing;

alleged injuries in fact were likely to be redressed by favorable decision precluding defendants from redirecting federal funds for construction of barrier, as required for states to possess Article III standing;

states possessed cause of action under Administrative Procedure Act (APA) against defendants; and

sections of Department of Defense Appropriations Act allowing Secretary of Defense to transfer working capital funds for military functions necessary in the national interest

to Department of Defense did not authorize transfer of federal funds for construction of barrier.

Affirmed.

Collins, J., issued dissenting opinion.

Attorneys and Law Firms

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Douglas N. Letter (argued), Todd B. Tatelman, Megan Barbero, Josephine Morse, and Kristin A. Shapiro, United States House of Representatives, Washington, D.C.; Carter G. Phillips, Virginia A. Seitz, Joseph R. Guerra, and Christopher A. Eiswerth, Sidley Austin LLP, Washington, D.C.; for Amicus Curiae United States House of Representatives.

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John W. Howard, George R. Wentz Jr., Richard Seamon, and D. Colton Boyles, Davillier Law Group LLC, Sandpoint, Idaho, for Amicus Curiae State of Arizona House of Representatives Federal Relations Committee.

Richard P. Hutchison, Landmark Legal Foundation, Kansas City, Missouri; Michael J. O'Neill and Matthew C. Forys, Landmark Legal Foundation, Leesburg, Virginia; for Amici Curiae Angel Families, Sabine Durden, Don Rosenberg, Brian McAnn, Judy Zeito, Maureen Mulroney, Maureen Laquerre, Dennis Bixby, and Advocates for Victims of Illegal Alien Crimes.

Douglas A. Winthrop, Arnold & Porter Kaye Scholer LLP, San Francisco, California; Irvin B. Nathan, Robert N. Weiner, Andrew T. Tutt, Kaitlin Konkel, and Samuel F. Callahan, Arnold & Porter Kaye Scholer LLP, Washington, D.C.; for Amici Curiae Former Members of Congress.

Elizabeth B. Wydra, Brianne J. Gorod, Brian R. Frazelle, and Ashwin P. Phatak, Constitutional Accountability Center, Washington, D.C., for Amici Curiae Federal Courts Scholars. Steven A. Zalesin, Adeel A. Mangi, and Amir Badat, Patterson Belknap Webb & Tyler LLP, New York, New York, for Amici Curiae 75 Religious Organizations.

Harold Hongju Koh, Peter Gruber Rule of Law Clinic, Yale Law School, New Haven, Connecticut; Kathleen R. Hartnett, Boies Schiller Flexner LLP, San Francisco, California; Phillip Spector, Messing & Spector LLP, Baltimore, Maryland; for Amici Curiae Former United States Government Officials.

Samuel F. Daughety and Suzanne R. Schaeffer, Dentons US LLP, Washington, D.C.; Joshua O. Rees, Acting Attorney General, Tohono O'Odham Nation, Sells, Arizona; for Amicus Brief Tohono O'Odham Nation.

Appeal from the United States District Court for the Northern District of California, Haywood S. Gilliam, Jr., District Judge, Presiding, D.C. No. 4:19-cv-00872-HSG

Before: Sidney R. Thomas, Chief Judge, and Kim McLane Wardlaw and Daniel P. Collins, Circuit Judges.

Dissent by Judge Collins

OPINION

THOMAS, Chief Judge:

This appeal presents the question of whether the Department of Defense Appropriations Act of 2019 authorized the Department of Defense ("DoD") to make budgetary transfers from funds appropriated by Congress to it for other purposes in order to fund the construction of a wall on the southern border of the United States in California and New Mexico. We conclude that the transfers were not authorized by the terms of the Act, and we affirm the judgment of the district court. [1]

I

The President has long supported the construction of a border wall on the southern border between the United States and Mexico. Since the President took office in 2017, however, Congress has repeatedly declined to provide the amount of funding requested by the President.

The debate over border wall funding came to a head in December of 2018. During negotiations to pass an appropriations bill for the remainder of the fiscal year, the President announced that he would not sign any legislation that did not allocate substantial funds to border wall construction. On January 6, 2019, the White House requested $5.7 billion to fund the construction of approximately 234 miles of new physical barrier. [2] Budget negotiations concerning border wall funding reached an impasse, triggering the longest partial government shutdown in United States history.

After 35 days, the government shutdown ended without an agreement to provide increased border wall funding in the amount requested by the President. On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), which included the Department of Homeland Security Appropriations Act for Fiscal Year 2019, Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA appropriated only $1.375 billion for border wall construction, specifying that the funding was for "the construction of primary pedestrian fencing ... in the Rio Grande Valley Sector." *Id.* § 230(a)(1). The President signed the CAA into law the following day.

The President concurrently issued a proclamation under the National Emergencies Act, 50 U.S.C. §§ 1601–1651, "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). [3] An accompanying White House Fact Sheet explained that the President was "using his legal authority to take Executive action to secure additional resources" to build a border wall, and it specified that "the Administration [had] so far identified up to $8.1 billion that [would] be available to build the border wall once a national emergency [was] declared and additional funds [were] reprogrammed." The Fact Sheet identified several funding sources, including $2.5 billion of Department of Defense ("DoD") funds that could be transferred to provide support for counterdrug activities of other federal government agencies under 10 U.S.C. § 284 ("Section 284"). [4] Executive Branch agencies began using the funds identified by the Fact Sheet to fund border wall construction. On February 25, the Department of Homeland Security ("DHS") submitted to DoD a request for Section 284 assistance to block drug smuggling corridors. In particular, it requested that DoD fund "approximately 218 miles" of wall using this authority, comprised of numerous projects, including the El Centro Sector Project 1 in California and the El Paso Sector Project 1 in New Mexico, as relevant to this case. On March 25, Acting Secretary of Defense Patrick Shanahan approved three border wall construction projects: Yuma Sector Projects 1 and 2 in Arizona and El Paso Sector Project 1 in New Mexico. On May 9, Shanahan approved four more border wall construction projects: El Centro Sector Project 1 in California and Tucson Sector Projects 1–3 in Arizona.

***3** Because these projects were undertaken to construct barriers and roads in furtherance of border security, Acting Secretary of Homeland Security Kevin McAleenan invoked the authority granted to him by Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 102(c), 110 Stat. 3009-546, 3009-554 (1996) (codified as amended as a note to 8 U.S.C. § 1103), to "waive all legal requirements" that would otherwise apply to the border wall construction projects "to ensure ... expeditious construction." 84 Fed. Reg. 17185-01 (April 24, 2019). On April 24, with respect to the El Paso Sector, he "waive[d] in their entirety, with respect to the construction of physical barriers and roads" a long list of statutes, "including all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" "[t]he National Environmental Policy Act" "(42 U.S.C. 4321 et seq.)," "the Endangered

Species Act" "(16 U.S.C. 1531 et seq.)," "the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 et seq.))," and "the Clean Air Act (42 U.S.C. 7401 et seq.)." *Id.* He executed a similar Section 102(c) waiver with respect to the El Centro Sector on May 15. 84 Fed. Reg. 21800-01 (May 15, 2019).

At the time Shanahan authorized these border wall construction projects, the counter-narcotics support account contained only $238,306,000 in unobligated funds, or less than one tenth of the $2.5 billion needed to complete those projects. To provide the support requested, Shanahan invoked the budgetary transfer authority found in Section 8005 of the 2019 DoD Appropriations Act to transfer funds from other DoD appropriations accounts into the Section 284 Drug Interdiction and Counter-Drug Activities-Defense appropriations account.

For the first set of projects, Shanahan transferred $1 billion from Army personnel funds. For the second set of projects, Shanahan transferred $1.5 billion from "various excess appropriations," which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan.

As authority for the transfers, DoD specifically relied on Section 8005 and Section 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) ("Section 8005"). [5]

Section 8005 provides, in relevant part, that:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred. [6]

Section 8005 also explicitly limits when its authority can be invoked: "*Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."

***4** Although Section 8005 does not require formal congressional approval of transfers, historically DoD had adhered to a "gentleman's agreement," by which it sought approval from the relevant congressional committees before transferring the funds. DoD deviated from this practice here—it did not request congressional approval before authorizing the transfer. Further, the House Committee on Armed Services and the House Committee on Appropriations both wrote letters to DoD formally disapproving of the reprogramming action after the fact. Moreover, with respect to the second transfer, Shanahan expressly directed that the transfer of funds was to occur "without regard to comity-based policies that require prior approval from congressional committees."

In the end, Section 8005 was invoked to transfer $2.5 billion of DoD funds appropriated for other purposes to fund border wall construction.

II

On February 18, 2019, sixteen states, [7] including California and New Mexico, filed a lawsuit challenging the Executive Branch's funding of the border wall. The States pled theories of violation of the constitutional separation of powers, violation of the Appropriations Clause, *ultra vires* action, violations of the Administrative Procedure Act ("APA"), and violations of the National Environmental Policy Act ("NEPA"). The next day, Sierra Club and the Southern Border Communities Coalition filed a separate action challenging the same border wall funding. [8]

The States subsequently filed a motion requesting a preliminary injunction to enjoin the transfer of funds to construct a border wall in New Mexico's El Paso Sector. The district court held that New Mexico had standing, but it

denied without prejudice the preliminary injunction motion. The court based part of its reasoning on the fact that it had already imposed a preliminary injunction in the *Sierra Club* action such that the grant of a preliminary injunction in favor of the States would be duplicative. California subsequently filed another motion requesting a preliminary injunction to enjoin the transfer of funds to construct a border wall in California's El Centro Sector.

California and New Mexico then moved for partial summary judgment on their declaratory judgment action as to the El Centro and El Paso Sectors, and additionally moved for a permanent injunction to enjoin funding the construction of these sectors. The Federal Defendants filed a cross-motion for summary judgment on all claims. The district court granted California and New Mexico's motion for partial summary judgment, and issued declaratory relief, holding the Section 8005 transfer of funds as to the El Centro and El Paso sectors unlawful. The district court denied the Federal Defendants' motion for summary judgment.

The court also denied California and New Mexico's motion for a permanent injunction, this time basing its reasoning, in part, on the permanent injunction ordered by the district court in the companion *Sierra Club* case. [9]

***5** The Federal Defendants requested that the district court certify its order as a final judgment for immediate appeal pursuant to Fed. R. Civ. P. 54(b). In response, the district court considered the appropriate factors, made appropriate findings, and certified the order as final pursuant to Rule 54(b). *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (listing factors). The Federal Defendants timely appealed the district court's judgment, and the States timely cross-appealed the district court's denial of injunctive relief. The district court's Rule 54(b) certification was proper; therefore, we have jurisdiction under 28 U.S.C. § 1291. *See Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121, 124 (9th Cir. 1995) (appeal is proper upon certification as a final judgment pursuant to Rule 54(b)).

We review the existence of Article III standing *de novo*. *See California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019). We review questions of statutory interpretation *de novo*.*See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017).

III

California and New Mexico have Article III standing to pursue their claims. In order to establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). [10] At summary judgment, a plaintiff cannot rest on mere allegations, but "must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (internal quotations and citations omitted). These specific facts, set forth "for purposes of the summary judgment motion[,] will be taken to be true." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

States are "entitled to special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007). As a quasi-sovereign, a state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237, 27 S.Ct. 618, 51 L.Ed. 1038 (1907). Thus, a state may sue to assert its "quasi-sovereign interests in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). In addition, "[d]istinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system." *Id.* at 607–08, 102 S.Ct. 3260.

A

Here, California and New Mexico have alleged that the actions of the Federal Defendants will cause particularized and concrete injuries in fact to the environment and wildlife of their respective states as well as to their sovereign interests in enforcing their environmental laws.

1

The El Centro Sector Project 1 involves the Jacumba Wilderness area. California contends that this area is home

to a large number of sensitive plant and animal species that are listed as "endangered," "threatened," or "rare" under the federal Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, or the California Endangered Species Act, Cal. Fish & Game Code § 2050 *et seq.* California alleges that "[t]he construction of border barriers within or near the Jacumba Wilderness Area ... will have significant adverse effects on environmental resources, including direct and indirect impacts to endangered or threatened wildlife." One such species is the federally and state-endangered peninsular desert bighorn sheep. Another is the flat-tailed horned lizard, a California species of special concern. [11]

***6** California has adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. According to the California Department of Fish and Wildlife 2018 annual report addressing sheep monitoring in the Jacumba Wilderness area, "[t]he Jacumba ewe group is dependent on resources both within the US and Mexico. A fence along the US-Mexico border would prohibit movement to, and use of, prelambing and lamb-rearing habitat and summer water sources," and the development of energy projects adjacent to the Jacumba Mountains "combined with disturbance by border security activities" "will have significant adverse impacts on this ewe group." California contends that road construction; grading and construction of equipment storage and parking areas; and off road movement of vehicle and equipment involved in construction will alter the normal behavior of peninsular bighorn sheep, with the most significant effect on the endangered peninsular bighorn sheep being the permanent reduction of its north-south movement across the U.S.-Mexico border. California further avers that the effects of a border wall will place additional pressure on the survival and recovery of the bighorn sheep because the unimpeded movement of the peninsular bighorn sheep between the United States and Mexico is important for increasing and maintaining their genetic diversity. It contends that as the number of animals that move between these two countries declines or ceases, the species will begin to suffer the deleterious effects of inbreeding and reduced genetic diversity.

Likewise, California asserts that the flat-tailed horned lizard lives within the project footprint and surrounding area, and that the extensive trenching, construction of roads, and staging of materials proposed in the area will harm or kill lizards that are either active or in underground burrows within the project footprint. It claims that the construction of the border wall will also greatly increase the predation rate of lizards adjacent to the wall by providing a perch for birds of prey and will effectively sever the linkage that currently exists between populations on both sides of the border.

New Mexico alleges that "[t]he construction of a border wall in the El Paso Sector along New Mexico's southern border will have adverse effects on the State's environmental resources, including direct and indirect impacts to endangered or threatened wildlife." Such harm "would include the blocking of wildlife migration, flooding, and habitat loss." It notes that the Chihuahuan desert is bisected by the New Mexico-Mexico border, and this "bootheel" region is the most biologically diverse desert in the Western Hemisphere, containing numerous endangered or threatened species. Such species include the Mexican gray wolf and the jaguar, both of which coexist in this region along the U.S.-Mexico border.

New Mexico has adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. It contends that the construction of El Paso Sector Project 1 may have a number of adverse effects on the Mexican wolf, including injury, death, harm, and harassment due to construction and related activities, as well as abandonment of the area for essential behaviors such as feeding, resting, and mating due to night lighting and the elimination of food sources and habitat in the area. Moreover, New Mexico avers that the construction of El Paso Sector Project 1 would interrupt the movement of the Mexican wolf across the U.S.-Mexico border, putting additional pressure on the species' survival and recovery in the wild because the unimpeded movement of Mexican wolves between the United States and Mexico is important for increasing and maintaining their genetic diversity. New Mexico notes that the documented movement of a radio-collared Mexican wolf across the border in the areas where border wall construction is planned demonstrates that construction will indeed cause such an interruption.

Additionally, the jaguar is considered endangered by the U.S. Fish and Wildlife Service ("USFWS"). New Mexico avers that jaguars were formerly widespread in the southwest United States, but were extirpated by hunting. It claims that, in recent decades, small numbers of individuals have dispersed north from breeding populations in northern Mexico, with some reaching the mountains in southwestern New Mexico west of Luna County. New Mexico contends that, if further long-term recolonization of jaguars continues, areas in Doña Ana and Luna counties include suitable habitat,

but construction of El Paso Sector Project 1 would stop jaguar movement through the region, potentially limiting recolonization.

***7** For these reasons, we conclude that California and New Mexico have each provided sufficient evidence which, if taken as true, would allow a reasonable fact-finder to conclude that both states will suffer injuries in fact to their environmental interests, and in particular, to protected species within their borders.

2

In addition, California and New Mexico have alleged that the Federal Defendants' actions have interfered with their respective abilities to enforce their environmental laws, thus interfering with the terms under which they participate in the federal system. They alleged that they have suffered, and will continue to suffer, injuries to their concrete, quasi-sovereign interests relating to the preservation of wildlife resources within their boundaries, including but not limited to wildlife on state properties.

California and New Mexico have adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. They have demonstrated that border wall construction injures their quasi-sovereign interests by preventing them from enforcing their environmental laws.

Under California law, the California Water Resources Control Board and nine regional boards establish water quality objectives and standards, and for construction projects like El Centro Sector Project 1, where dredge and fill activities are expected to occur, a regional board must ordinarily certify compliance with water quality standards. The record indicates that, absent the Secretary of Homeland Security's Section 102(c) IIRIRA waiver of the Clean Water Act requirements for the project, El Centro Project 1 could not proceed without completing certification issued by a regional water board because the El Centro Project 1 will occur within or near the Pinto Wash and will traverse at least six ephemeral washes that have been identified as waters of the United States. The record further indicates that, due to the nature and location of construction, El Centro Project 1 would also require enrollment in the State Water Board's statewide National Pollutant Discharge Elimination General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities.

Likewise, the Section 102(c) waiver of the Clean Air Act's requirements undermines California's enforcement of its air quality standards for complying with the Clean Air Act as set forth in California's State Implementation Plan ("SIP"). In particular, but for the waiver, in order to move forward with El Centro Project 1, the Federal Defendants "would be obligated to comply with Rule 801 [of the SIP], which requires the development and implementation of a dust-control plan for construction projects to prevent, reduce, and mitigate [fine particulate matter] emissions."

Moreover, the Section 102(c) waiver exempts the Federal Defendants from complying with laws designed to protect endangered or threatened species. For instance, it exempts the Federal Defendants from consulting with the USFWS to ensure that El Centro Sector Project 1 "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species" that are identified as endangered under California and federal law. 16 U.S.C. § 1536(a)(2). As we have noted, California contends that the El Centro Sector Project 1 is likely to harm federal and California endangered species such as the peninsular bighorn sheep and the flat-tailed horned lizard. The presence of these species led the USFWS, Bureau of Land Management ("BLM"), California Department of Fish and Wildlife, and California State Parks to develop and implement the "Flat-Tailed Horned Lizard Rangewide Management Strategy," which imposes restrictions on projects resulting in large-scale soil disturbances in the project area and prohibits activities that restrict the lizards' interchange with lizard populations across the border. Without the Section 102(c) waiver, this management strategy would impose certain restrictions and mitigation measures on the border wall construction projects.

***8** Under New Mexico law, the Federal Defendants, absent the Section 102(c) waiver of the Clean Air Act's requirements, would normally be required to comply with New Mexico's fugitive dust control rule and High Wind Fugitive Dust Mitigation Plan that New Mexico adopted under the Clean Air Act. *See*N.M. Admin. Code §§ 20.2.23.109–.112 (mandating that "[n]o person ... shall cause or allow visible emissions from fugitive dust sources that: pose a threat to public health; interfere with public welfare, including animal or plant injury or damage, visibility or the reasonable use of property" and "[e]very person subject to

this part shall utilize one or more control measures ... as necessary to meet the requirements of [this section]"). The waiver, however, prevents New Mexico from enforcing these air quality rules.

New Mexico further contends that, absent the Section 102(c) waiver, the Federal Defendants would also normally be required to consult with the USFWS to protect species such as the Mexican wolf that are endangered under both federal and New Mexico Law. Moreover, the USFWS's management plan for the species—the "Mexican Wolf Recovery Plan-First Revision"—which is designed to "facilitate the wolf's revival," "calls for a minimum of 320 wolves in the United States and 200 in Mexico to meet recovery goals." The "binational recovery strategy" of this plan was developed by the USFWS "in coordination with federal agencies in Mexico and state, federal, and Tribal agencies in the United States," and "[e]ffective recovery requires participation by multiple parties within Federal, state, and local governments." USFWS, MEXICAN WOLF RECOVERY PLAN-FIRST REVISION at 10, 16 (2017). Construction undermines this plan because it inhibits the "utilization of habitat" and does not promote "meta-population connectivity."

The Section 102(c) waiver likewise prevents New Mexico from enforcing its Wildlife Corridors Act. Portions of El Paso Project 1 cross New Mexico State Trust Lands, and New Mexico contends that the planned pedestrian fencing disrupts habitat corridors in New Mexico—contravening to the Wildlife Corridors Act. The Act "requires New Mexico state agencies to create a 'wildlife corridors action plan' to protect species' habitat." New Mexico further avers that New Mexico's State Trust Lands in and around the El Paso Project 1 site form an important wildlife corridor for numerous species such as mule deer, javelina, pronghorn, bighorn sheep, mountain lion, bobcat, coyote, bats, quail, and other small game like rabbits.

In sum, we conclude that California and New Mexico have each provided sufficient evidence which, if taken as true, would allow a reasonable fact-finder to conclude that they have both suffered injuries in fact to their sovereign interests.

B

Turning to the causation requirement, we conclude that California has alleged environmental and sovereign injuries "fairly traceable" to the Federal Defendants' conduct. To satisfy this requirement, California and New Mexico "need not show that [Section 8005 is] 'the very last step in the chain of causation.' " *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 169, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). "A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].' " *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Nat'l Audubon Soc., Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)).

With respect to most of the environmental injuries, causation is apparent—for instance, as explained above, the construction and presence of the border wall will separate the peninsular bighorn sheep and Mexican wolf populations, decreasing biodiversity, and harming these species.

***9** Although slightly more attenuated, we also conclude that the causation requirement is likewise satisfied for the injuries to California's and New Mexico's quasi-sovereign interests. It makes no difference that the Section 102(c) waiver is most directly responsible for these injuries because without Section 8005, there is no waiver. That is, without the Section 8005 funding to construct El Centro Sector Project 1 and El Paso Sector Project 1, there would be no basis to invoke Section 102(c), and therefore, no resulting harm to California's and New Mexico's sovereign interests. Thus, we conclude that these injuries too are fairly traceable to the Section 8005 transfers of funds.

C

A ruling in California and New Mexico's favor would redress their harms. Without the Section 8005 funds, DoD had inadequate funding to finance construction of these projects; presumably, without this funding, construction of El Centro Sector Project 1 and El Paso Sector Project 1 would cease. This would prevent both the environmental injuries and the sovereign injuries alleged.

Thus, these facts would allow a reasonable fact-finder to conclude that, if funds are diverted to construct border wall projects in the El Centro and El Paso Sectors, California and New Mexico will each suffer environmental and quasi-sovereign injuries in fact that are fairly traceable to the challenged conduct of the Federal Defendants and likely to be redressed by a favorable judicial decision. California and New

Mexico have established the requisite Article III standing to challenge the Federal Defendants' actions.

IV

The Federal Defendants argue that California and New Mexico lack the right to challenge the transfer of funds under the APA. We disagree. [12]

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Where a statute imposes obligations on a federal agency but the obligations do not "give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005). California and New Mexico must, however, establish that they fall within the zone of interests of the relevant statute to bring an APA claim. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012) ("This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970))).

Section 8005 does not confer a private right of action. Instead, it delegates a narrow slice of Congress's appropriation power to DoD to allow the agency to respond flexibly to unforeseen circumstances implicating the national interest. In doing so, the statute imposes certain obligations upon DoD—*i.e.*, DoD cannot invoke Section 8005 unless there is an unforeseen military requirement and unless Congress did not previously deny the item requested. California and New Mexico argue that DoD did not satisfy these obligations. We agree. Therefore, as aggrieved parties, California and New Mexico may pursue a remedy under the APA, so long as they fall within Section 8005's zone of interests.

***10** As a threshold matter, Section 8005 is the relevant statute for the zone of interests test. "Whether a plaintiff's interest is 'arguably ... protected ... by the statute' within the meaning of the zone-of-interests test is to be determined *not by reference to the overall purpose of the Act* in question ... but by reference to the *particular provision of law* upon which the plaintiff relies." *Bennett*, 520 U.S. at 175–76, 117 S.Ct. 1154 (emphasis added). Here, for purposes of their APA claim, California and New Mexico rely on Section 8005's limitations. Thus, Section 8005 is the relevant statute for the zone of interests test.

The Supreme Court has clarified that, in the APA context, the zone of interests test does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.' " *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). It has repeatedly emphasized that the zone of interests test is "not 'especially demanding' " in the APA context. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014) (quoting *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199). Instead, for APA challenges, a plaintiff can satisfy the test in either one of two ways: (1) "if it is among those [who] Congress expressly or directly indicated were the intended beneficiaries of a statute," or (2) "if it is a suitable challenger to enforce the statute—that is, if its interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further ... statutory objectives." *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (alterations in original) (quotations and citations omitted). "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750). "We apply the test in keeping with Congress's 'evident intent' ... 'to make agency action presumptively reviewable[,]' " and note that "the benefit of any doubt goes to the plaintiff." *Id.* (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750).

In enacting Section 8005, Congress primarily intended to benefit itself and its constitutional power to manage appropriations. The obligations imposed by the section limit the scope of the authority delegated to DoD, reserving to Congress in most instances the power to appropriate funds to particular DoD accounts for specific purposes. This conclusion is reinforced by the legislative history. Congress first imposed limits on DoD's transfer authority in order to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973).

The field of suitable challengers must be construed broadly in this context because, although Section 8005's obligations were intended to protect Congress, restrictions on congressional standing make it difficult for Congress to enforce these obligations itself. *See Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated and remanded on other grounds*, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1979) (explaining that a member of Congress has standing only if "the alleged diminution in congressional influence ... amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity"). Indeed, the House of Representatives filed its own lawsuit in the U.S. District Court for the District of Columbia challenging this same transfer of funds, but the court held that the House lacked standing to sue. *See U.S. House of Reps. v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019) ("And while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority.").

***11** California and New Mexico are suitable challengers because their interests are congruent with those of Congress and are not "inconsistent with the purposes implicit in the statute." *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199. First, this challenge actively furthers Congress's intent to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). In particular, this challenge furthers this intent because, even though Section 8005 does not require formal congressional approval to reprogram funds, the congressional committees expressly disapproved of DoD's use of the authority here.

Second, California and New Mexico's challenge strives to reinforce the same structural constitutional principle Congress sought to protect through Section 8005: congressional power over appropriations. *See*U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...."); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) (explaining that this "straightforward and explicit command" " 'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress' " (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321, 57 S.Ct. 764, 81 L.Ed. 1122 (1937))). California and New Mexico's interest in reinforcing these structural separation of powers principles is unique but aligned with that of Congress because just as those principles are intended "to protect each branch of [the federal] government from incursion by the others," the "allocation of powers in our federal system [also] preserves the integrity, dignity, and residual sovereignty of the States," because "[f]ederalism has more than one dynamic." *Bond v. United States*, 564 U.S. 211, 221–22, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). This interest applies with particular force here because the use of Section 8005 here impacts California's and New Mexico's ability to enforce their state environmental laws. *See Massachusetts v. EPA*, 549 U.S. at 518–19, 127 S.Ct. 1438 (" '[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.' " (quoting *Tenn. Copper Co.*, 206 U.S. at 237, 27 S.Ct. 618)); *see also Maine v. Taylor*, 477 U.S. 131, 151, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) ("[A state] retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."). Here, the use of Section 8005 allows the government to invoke Section 102(c) of IIRIRA to waive state environmental law requirements for purposes of building the border wall. [13] Thus, Section 8005's limitations protect California's and New Mexico's sovereign interests, just as they protect Congress's constitutional interests, because they ensure that, ordinarily, Executive action cannot override these interests without congressional approval and funding. Therefore, just as Section 8005's limitations serve Congress to preserve the "equilibrium the Constitution sought to establish—so that 'a gradual concentration of the several powers in the same department,' can effectively be resisted," they likewise serve California and New Mexico as well. *Morrison v. Olson*, 487 U.S. 654, 699, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting) (quoting Federalist No. 51, p. 321 (J. Madison)).

***12** Moreover, that the states regularly benefit from DoD's use of Section 8005 reinforces that California and New Mexico's interests are *not* "so marginally related" that "it can[ ] reasonably be assumed that Congress intended to permit suit." *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199. For instance, in 2004 DoD invoked Section 8005 to transfer funds to pay for storm damages incurred by airforce bases across Florida during Hurricane Charley. Office of the Under Sec'y of Def. (Comptroller), FY 04-37 PA, Reprogramming Action (2004). Likewise, in 2008 DoD invoked Section 8005 to finance costs incurred by the National Guard in responding to Hurricane Gustav in Louisiana, Texas, Mississippi, and Alabama, as well as operations related to Hurricane Ike in Texas and Louisiana. Office of the Under Sec'y of Def. (Comptroller), FY 08-43 PA, Reprogramming Action (2008).

The historical use of Section 8005 supports that states are "reasonable" and "predictable" challengers to its use, and this instance is no anomaly. *Patchak*, 567 U.S. at 227, 132 S.Ct. 2199.

For these reasons, California and New Mexico easily fall within the zone of interests of Section 8005 and are suitable challengers to enforce its obligations. We therefore affirm the grant of summary judgment to the States. To conclude otherwise would effectively hold that no entity could fall within Section 8005's zone of interests, and that no agency action taken pursuant to Section 8005 could ever be challenged under the APA. Such a conclusion is not tenable, and a result Congress surely did not intend.

V

The district court correctly held that Section 8005 did not authorize DoD's budgetary transfer to fund construction of the El Paso and El Centro Sectors.

In construing a statute, we begin, as always, with the language of the statute. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1026 (9th Cir. 2013). "When terms are not defined within a statute, they are accorded their plain and ordinary meaning, which can be deduced through reference sources such as general usage dictionaries." *Id.* Of course, "[s]tatutory language must always be read in its proper context," *id.* (quotations and citation omitted), as courts must look to the "design of the statute as a whole and to its object and policy," *id.* (quotations and citation omitted), and "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1748, 204 L.Ed.2d 34 (2019) (quotations and citation omitted).

Section 8005's transfer authority cannot be invoked "unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Two limitations are important to our analysis: (1) that the transfer must be "based on unforeseen military requirements," and (2) that the transfer authority cannot be invoked if the "item for which funds are requested ha[d] been denied by the Congress." We conclude that the district court correctly determined that the border wall was not an unforeseen military requirement, that funding for the wall had been denied by Congress, and therefore, that the transfer authority granted by Section 8005 was not permissibly invoked.

A

Section 8005 authorizes the transfer of funds only in response to an "unforeseen military requirement." The district court properly concluded that the need for a border wall was not unforeseen. We also conclude that the need was unrelated to a military requirement.

1

Section 8005 does not define "unforeseen." Therefore, we start by considering the ordinary meaning of the word. Something is unforeseen when it is "not anticipated or expected." *Unforeseen*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). By contrast, to foresee is "to see (something, such as a development) *beforehand*." *Foresee*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020) (emphasis added). Prior use of this authority confirms this meaning. Previously, DoD has invoked its Section 8005 authority to transfer funds to repair hurricane and typhoon damage to military bases—natural disasters that inflict damage that may not be anticipated or expected ahead of time. We conclude that an unforeseen requirement is one that DoD did not anticipate or expect.

***13** Neither the problem, nor the President's purported solution, was unanticipated or unexpected here. The smuggling of drugs into the United States at the southern border is a longstanding problem. U.S. CUSTOMS AND BORDER PATROL, BORDER PATROL HISTORY, https://www.cbp.gov/border-security/along-us-borders/history (last visited June 16, 2020) ("By [the early 1960's] the business of alien smuggling began to involve drug smuggling also. The Border Patrol assisted other agencies in intercepting illegal drugs from Mexico."); *United States v. Flores-Montano*, 541 U.S. 149, 153, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004) ("That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 1/2 fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry."). Indeed, the federal Drug Enforcement Administration was created over four decades ago in 1974 in large part to address the smuggling of illegal drugs into the

United States. *See* Reorganization Plan No. 2 of 1973, 87 Stat. 1091, as amended Pub. L. 93-253, § 1, 88 Stat. 50 (1974).

Congress's joint resolution terminating the President's declaration of a national emergency only reinforces this point: there was no unanticipated crisis at the border. Nothing prevented Congress from funding solutions to this problem through the ordinary appropriations process—Congress simply chose not to fund this particular solution.

The long, well-documented history of the President's efforts to build a border wall demonstrates that he considered the wall to be a priority from the earliest days of his campaign in 2015. *See, e.g.*, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015) ("I would build a great wall ... I will build a great, great wall on our southern border."); *Transcript of Donald Trump's Immigration Speech*, NEW YORK TIMES (Sept. 1, 2016) ("On day one, we will begin working on an impenetrable, physical, tall, power, beautiful southern border wall."). Moreover, his repeated pronouncements on the subject made clear that federal agencies like DoD might be tasked with the wall's funding and construction. Congress's repeated denials of funding only drew national attention to the issue and put agencies on notice that they might be asked to finance construction. *See* Securing America's Future Act of 2018, H.R. 4760, 115th Cong. § 1111 (2018); Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. § 5101 (2018); American Border Act, H.R. 6415, 115th Cong. § 4101 (2018); Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. § 2 (2018); Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. § 9 (2018); 50 Votes for the Wall Act, H.R. 7073, 115th Cong. § 2 (2018); WALL Act of 2018, S. 3713, 115th Cong. § 2 (2018). In short, neither the conditions at the border nor the President's position that a wall was needed to address those conditions was unanticipated or unexpected by DoD.

The Federal Defendants' arguments to the contrary are unpersuasive. They assert that "an agency's *request*" "will be foreseen" only "when *it is received* by DoD in time to include in the submission to Congress [for the yearly budget]," and that therefore, the transfer at issue here complied with the text of the statute. (emphasis added). There are two problems with the Federal Defendants' position.

First, Section 8005 permits transfers based only on unforeseen military *requirements*—not unforeseen budgetary *requests*. A requirement that gives rise to a funding request is distinct from the request itself. Here, the requirement that gave rise to the Section 284 requests is a border wall. Thus, to invoke the statute, the need for a border wall must have been unforeseen. To hold otherwise—*i.e.*, to conclude that transfers are permitted under Section 8005 if they are based on unforeseen budgetary requests—would undermine the narrowness of the statute and potentially encourage DoD and other agencies to submit budgetary requests after DoD has submitted its final budget to Congress in order to skirt the congressional appropriations process. This result is inconsistent with the purpose of Section 8005: to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). If this interpretation prevailed, the exception would swallow the rule and undermine Congress's constitutional appropriations power.

***14** Second, even if we were to accept the government's definition of "requirement" as equivalent to "request," DHS's specific Section 284 requests were both anticipated and expected, even within the confines of the appropriations context. Nearly six months before the enactment of the 2019 DoD Appropriations Act, the President wrote the following in a memorandum to the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security: "The Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband ... into this country." Further, in a response to a request for information from the House Armed Services Committee, DoD wrote that the "DoD Comptroller with[eld] over 84% ($947 million) of [counter-drug] appropriated funds for distribution until the 4th Quarter for possible use in supporting Southwest Border construction last fiscal year." As explained by the Staff Director of the House Armed Services Committee, this "suggests that DoD was considering using its counter-drug authority under 10 U.S.C. § 284 for southern border construction in early 2018." Further still, because Section 284 only allows DoD to provide support that is *requested* by other agencies, DoD's retention of funds suggests it likely anticipated such a request. *See*10 U.S.C. § 284(a)(1) ("The Secretary of Defense may provide support ... if ... such support is requested.").

The Federal Defendants also unpersuasively equate "foreseen" with "known." "[T]o know" means "to perceive directly: have direct cognition of." *Know*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). This interpretation effectively eliminates any element of anticipation or expectation. " 'Congress' choice of words is

presumed to be deliberate' and deserving of judicial respect." *SAS Inst., Inc. v. Iancu*, —— U.S. ——, 138 S. Ct. 1348, 1355, 200 L.Ed.2d 695 (2018) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013)). Thus, we must presume that Congress's use of the word "unforeseen" is deliberate. Congress could have easily specified that a transfer is permitted only when based on "unknown" requirements, but it did not. Instead, Congress specified that Section 8005 permits a transfer only where a requirement was unforeseen—*i.e.*, unanticipated or unexpected. We decline to read into the text a lower standard based on actual knowledge. [14]

In sum, both the requirement to build a wall on the southern border as well as the DHS request to DoD to build that wall were anticipated and expected. Thus, neither was "unforeseen" within the meaning of Section 8005.

2

Section 8005 not only mandates that the requirement be unforeseen, but also that it be a *military requirement*. Under relevant definitions, the construction of El Centro and El Paso projects does not satisfy any definition of a "military requirement."

The 2019 Appropriations Act does not define "military." Therefore, we start by considering its ordinary meaning: "of or relating to soldiers, arms, or war." *Military*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). The border wall construction projects here plainly fail to satisfy this definition because the Federal Defendants have argued neither that the border wall construction projects are related to the use of soldiers or arms, nor that there is a war on the southern border.

The administrative record underscores this point, and supports that the border wall construction projects are not military ones. The record demonstrates that the diverted funding is primarily intended to support DHS—a civilian agency entirely separate from any branch of the armed forces. The Assistant Secretary of Defense stated that the funds were transferred "to provide assistance to DHS to construct fencing to block drug-smuggling corridors in three project areas along the southern border of the United States." He also explained that the purpose of the transfer was to "support DHS's efforts to secure the southern border." By contrast, the transfer of funds for border wall construction does little to assist DoD with any of its operations. Even to the extent it might, it does so only insofar as it helps DoD assist DHS: as summarized by the Chairman of the Joint Chiefs of Staff and DHS, border wall projects "allow DoD *to provide support to DHS* more efficiently and effectively." (emphasis added). In short, the fact that construction is intended to support a civilian agency, as opposed to DoD itself or any branch of the armed forces, emphasizes that the transfer fails to meet the plain meaning of "military."

***15** The border wall construction projects do not even satisfy a statutory definition specifically invoked by the Federal Defendants. *See also*WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 273 (2d ed. 2006) ("A word or clause that is ambiguous at first glance might be clarified if 'the same terminology is used elsewhere in a context that makes its meaning clear' " and such coherence arguments may be invoked "across as well as within statutes" (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988))).

The Federal Defendants have also invoked 10 U.S.C. § 2808 ("Section 2808") to fund other border wall construction projects on the southern border. Section 2808 incorporates the definition of "military construction" provided by 10 U.S.C. § 2801(a): it defines "military construction" as construction associated with a "military installation" or "defense access road." Section 2801(c)(4) further defines "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." [15]

The border wall construction projects at issue in this appeal are not carried out with respect to a "military installation." The projects themselves are not a base, camp, station, yard, or center, and unlike the projects considered by the Federal Defendants' related Section 2808 appeal, the projects at issue in this appeal have not been brought under military jurisdiction. Moreover, there are no military installations in the El Centro or El Paso project areas, nor any claim of a requirement for a defense access road; instead, as we have noted, the projects affect open wilderness areas—the El Centro Sector project involves the Jacumba Wilderness areas, and the El Paso Sector project involves the Chihuahuan desert. The fact that the construction projects fail to meet Section 2808's definition of military construction supports

that these projects fail to satisfy any meaningful definition of "military."

Even if we were to afford some consideration to the subchapter title for Section 284 authorizing "Military Support for Civilian Law Enforcement Agencies," there is a distinction to be drawn between "military support," and what the statute requires: a "military requirement." Requirement ordinarily means "something wanted or needed," or "something essential to the existence or occurrence of something else." *Requirement*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). The border wall construction projects are not something needed or essential to the armed forces, soldiers, arms, or any sort of war effort. Rather, as explained above, they are designed to "provide assistance" and "support" to DHS, a civilian agency. While providing such support may be appropriate under Section 284, a request for this support without connection to any military function fails to rise to the level of a military requirement for purposes of Section 8005. Simply because a civilian agency requests support in furtherance of a particular objective, even when such support is authorized by statute, does not mean that the military itself *requires* that objective.

***16** To conclude that supporting projects unconnected to any military purpose or installation satisfies the meaning of "military requirement" would effectively write the term out of Section 8005. Therefore, we conclude that the transfers at issue here do not satisfy Section 8005's military purpose requirement.

B

In addition, Section 8005 authorizes the transfer of funds only when "the item for which funds are requested has [not] been denied by the Congress." The question here is whether by declining to provide sufficient funding for the border wall, Congress denied the item for which funds were requested within the meaning of the statute.

As we have explained, Congress declined to fund the border wall numerous times in a variety of ways. Congress failed to pass seven different bills, *see supra at*—— – ——, that were proposed specifically to fund the wall. Congress also refused to appropriate the $5.7 billion requested by the White House in the CAA; instead, Congress appropriated $1.375 billion, less than a quarter of the funds requested, for "the construction of primary pedestrian fencing ... in the Rio Grande Valley Sector." CAA at § 230(a)(1).

The Federal Defendants assert that the Section 8005 transfer would be invalid only if Congress had denied a Section 284 budgetary line item request to fund the border wall. But "[i]n common usage, a general denial of something requested can, and in this case does, encompass more specific or narrower forms of that request." *Sierra Club v. Trump*, 929 F.3d 670, 691 (9th Cir. 2019). Here, Congress refused to provide the funding requested by the President for border wall construction: a general denial. This general denial necessarily encompasses narrower forms of denial—such as the denial of a Section 284 budgetary line item request. We decline to impose upon Congress an obligation to deny every possible source of funding when it refuses to fund a particular project—surely when Congress withheld additional funding for the border wall, it intended to withhold additional funding for the wall, regardless of its source. "No" means no.

To hold that Congress did not previously deny the Executive Branch's request for funding to construct a border wall would be to "find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring). Regardless of how specific a denial may be in some circumstances, Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005. This history precludes the use of Section 8005's transfer authority.

C

In sum, Section 8005 did not authorize the transfer of funds challenged by California and New Mexico. Absent such statutory authority, the Executive Branch lacked independent constitutional authority to transfer the funds at issue here. *See City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233–34 (9th Cir. 2018) ("[W]hen it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." (quoting *Youngstown*, 343 U.S. at 637, 72 S.Ct. 863 (Jackson, J., concurring))). Therefore, the transfer of funds at issue here was unlawful. We affirm the district court's declaratory judgment to California and New Mexico.

VI

***17** Finally, we consider the district court's denial of California and New Mexico's request for injunctive relief, a decision we review for an abuse of discretion. *See Midgett v. Tri-Cty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 849 (9th Cir. 2001). The district court denied the States' request for a permanent injunction primarily because the relief sought was duplicative of the relief the district court had already granted in the *Sierra Club* matter. That decision, which is the only one before us in this appeal, was certainly not an abuse of discretion. As we have noted, however, subsequent to the district court's decision, the Supreme Court stayed the *Sierra Club* permanent injunction. *See Sierra Club*, 140 S. Ct. at 1.

Nevertheless, given the totality of the considerations at issue in this case, we continue to see no abuse of discretion in the district court's order, even though at this moment, the injunction in *Sierra Club* no longer affords the States protection. We emphasize, however, that depending on further developments in these cases, the States are free to seek further remedies in the district court or this Court.

VII

In sum, we affirm the district court. We conclude that California and New Mexico have Article III standing to file their claims, that California and New Mexico are sufficiently within Section 8005's zone of interests to assert an APA claim, and that the Federal Defendants violated Section 8005 in transferring DoD appropriations to fund the El Centro and El Paso Sectors of the proposed border wall. We also decline to reverse the district court's decision against imposing a permanent injunction, without prejudice to renewal. Given our resolution of this case founded upon the violations of Section 8005, we need not—and do not—reach the merits of any other theory asserted by the States, nor reach any other issues presented by the parties.

AFFIRMED.

COLLINS, Circuit Judge, dissenting:

In the judgment under review, the district court granted summary judgment and declaratory relief to California and New Mexico on their claims challenging the Acting Secretary of Defense's invocation of § 8005 and § 9002 of the Department of Defense Appropriations Act, 2019 ("DoD Appropriations Act"), Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2999, 3042 (2018), to transfer $2.5 billion in funds that Congress had appropriated for other purposes into a different Department of Defense ("DoD") appropriation that could then be used by DoD for construction of border fencing and accompanying roads and lighting. The States allege that the transfers were not authorized under § 8005 and § 9002 and that, as a result of the construction activities made possible by the unlawful transfers, the States have suffered injuries to their sovereign and environmental interests. The majority concludes that the States have Article III standing; that they have a cause of action to challenge the transfers under the Administrative Procedure Act ("APA"); that the transfers were unlawful; and that the district court properly determined that the States are not entitled to any relief beyond a declaratory judgment. I agree that at least California has established Article III standing, but in my view the States lack any cause of action to challenge the transfers, under the APA or otherwise. And even assuming that they had a cause of action, I conclude that the transfers were lawful. Accordingly, I would reverse the district court's partial judgment for the States and remand for entry of partial summary judgment in favor of the Defendants. I respectfully dissent.

I

***18** The parties' dispute over DoD's funding transfers comes to us against the backdrop of a complex statutory framework and an equally complicated procedural history. Before turning to the merits, I will briefly review both that framework and that history.

A

Upon request from another federal department, the Secretary of Defense is authorized to "provide support for the counterdrug activities" of that department by undertaking the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(a), (b)(7). On February 25, 2019, the Department of Homeland Security ("DHS") made a formal request to DoD for such assistance. Noting that its counterdrug activities included the construction of border infrastructure, *see* Illegal Immigration Reform and Immigrant Responsibility Act of

1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 102(a), 110 Stat. 3009-546, 3009-554 (1996) (codified as amended as a note to 8 U.S.C. § 1103), DHS requested that "DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences[,] roads, and lighting" in several specified "Project Areas" in order "to block drug-smuggling corridors across the international boundary between the United States and Mexico."

On March 25, 2019, the Acting Defense Secretary invoked § 284 and approved the provision of support for, *inter alia*, DHS's "El Paso Sector Project 1," which would involve DoD construction of border fencing, roads, and lighting in Luna and Doña Ana Counties in New Mexico. Thereafter, the Secretary of Homeland Security invoked his authority under § 102(c) of IIRIRA to waive a variety of federal environmental statutes with respect to the planned construction of border infrastructure in the El Paso Sector, as well as "all ... state ... laws, regulations, and legal requirements of, deriving from, or related to the subject of," those federal laws. *See*84 Fed. Reg. 17185, 17187 (Apr. 24, 2019).

Subsequently, on May 9, 2019, the Acting Defense Secretary again invoked § 284, this time to approve DoD's construction of similar border infrastructure to support, *inter alia*, DHS's "El Centro Sector Project 1" in Imperial County, California. Less than a week later, the Secretary of Homeland Security again invoked his authority under IIRIRA § 102(c) to waive federal and state environmental laws, this time with respect to the construction in the relevant section of the El Centro Sector. *See*84 Fed. Reg. 21800, 21801 (May 15, 2019).

Although § 284 authorized the Acting Defense Secretary to provide this support, there were insufficient funds in the relevant DoD appropriation to do so. Specifically, for Fiscal Year 2019, Congress had appropriated for "Drug Interdiction and Counter-Drug Activities, Defense" a total of only $670,271,000 that could be used for counter-drug support. *See* DoD Appropriations Act, Title VI, 132 Stat. at 2997 (appropriating, under Title governing "Other Department of Defense Programs," a total of "$881,525,000, of which $517,171,000 shall be for counter-narcotics support"); *id*., Title IX, 132 Stat. at 3042 (appropriating $153,100,000 under the Title governing "Overseas Contingency Operations"). Accordingly, to support the El Paso Sector Project 1, the Acting Secretary on March 25, 2019 invoked his authority to transfer appropriations under § 8005 of the DoD Appropriations Act and ordered the transfer of $1 billion from "excess Army military personnel funds" into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. That transfer was accomplished by moving $993,627,000 from the "Military Personnel, Army" appropriation and $6,373,000 from the "Reserve Personnel, Army" appropriation.

***19** To support the El Centro Sector Project 1, the Acting Secretary on May 9, 2019 again invoked his transfer authority to move an additional $1.5 billion into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. Pursuant to § 8005 of the DoD Appropriations Act, DoD transferred a total of $818,465,000 from 12 different DoD appropriations into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. Invoking the Secretary's distinct but comparable authority under § 9002 to transfer funds appropriated under the separate Title governing "Overseas Contingency Operations," DoD transferred $604,000,000 from the "Afghanistan Security Forces Fund" appropriation and $77,535,000 from the "Operation and Maintenance, Defense-Wide" appropriation into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation.

B

The complex procedural context of this case involves two parallel lawsuits and four appeals to this court, and it has already produced one published Ninth Circuit opinion that was promptly displaced by the Supreme Court.

1

California and New Mexico, joined by several other States, filed this action in the district court against the Acting Defense Secretary, DoD, and a variety of other federal officers and agencies. In their March 13, 2019 First Amended Complaint, they sought to challenge, *inter alia*, any transfer of funds by the Acting Secretary under § 8005 or § 9002. The Sierra Club and the Southern Border Communities Coalition ("SBCC") filed a similar action, and their March 18, 2019 First Amended Complaint also sought to challenge any such transfers. Both sets of plaintiffs moved for preliminary injunctions in early April 2019. The portion of the States' motion that was directed at the § 8005 transfers was asserted only on behalf of New Mexico and only with respect to the construction on New Mexico's border (*i.e.*, El Paso Sector Project 1). The Sierra Club motion was likewise directed at El Paso Sector Project

1, but it also challenged two other projects in Arizona ("Yuma Sector Projects 1 and 2").

After concluding that the Sierra Club and SBCC were likely to prevail on their claims that the transfers under § 8005 were unlawful and that these organizational plaintiffs had demonstrated a "likelihood of irreparable harm to their members' aesthetic and recreational interests," the district court on May 24, 2019 granted a preliminary injunction enjoining Defendants from using transferred funds for "Yuma Sector Project 1 and El Paso Sector Project 1."[1] In a companion order, however, the district court denied preliminary injunctive relief to the States. Although the court held that New Mexico was likely to succeed on its claim that the transfers under § 8005 were unlawful, the court concluded that, in light of the grant of a preliminary injunction against El Paso Sector Project 1 to the Sierra Club and SBCC, New Mexico would not suffer irreparable harm from the denial of its duplicative request for such relief. On May 29, 2019, Defendants appealed the preliminary injunction in favor of the Sierra Club and SBCC, and after the district court refused to stay that injunction, Defendants moved in this court for an emergency stay on June 3, 2019. New Mexico did not appeal the district court's denial of its duplicative request for a preliminary injunction.

2

While the Defendants' emergency stay request was being briefed and considered in this court, California and New Mexico (but not the other States) moved for partial summary judgment on June 12, 2019. The motion was limited to the issue of whether the transfers under § 8005 and § 9002 were lawful, and it requested corresponding declaratory relief, as well as a permanent injunction against the use of transferred funds for El Paso Sector Project 1 and El Centro Sector Project 1. The Sierra Club and SBCC filed a comparable summary judgment motion that same day, directed at those two projects, as well as at Yuma Sector Project 1 and three other Arizona projects ("Tucson Projects 1, 2, and 3"). Defendants filed cross-motions for summary judgment on the legality of the transfers under § 8005 and § 9002 with respect to the corresponding projects at issue in each case.

***20** On June 28, 2019, the district court granted partial summary judgment and declaratory relief to both sets of plaintiffs, concluding that the transfers under § 8005 and § 9002 were unlawful. The court granted permanent injunctive relief to the Sierra Club and SBCC against all six projects, but it denied any such relief to California and New Mexico. The district court concluded that California and New Mexico had failed to prove a threat of future demonstrable environmental harm. The court expressed doubts about the States' alternative theory that they had demonstrated injury to their sovereign interests, but the court ultimately concluded that it did not need to resolve that issue. As before, the district court instead held that California and New Mexico would not suffer any irreparable harm in light of the duplicative relief granted to the Sierra Club and SBCC. The district court denied Defendants' cross-motions for summary judgment in both cases. Invoking its authority under Federal Rule of Civil Procedure 54(b), the district court entered partial judgments in favor of, respectively, the Sierra Club and SBCC, and California and New Mexico. The district court denied Defendants' request to stay the permanent injunction pending appeal.

3

On June 29, 2019, Defendants timely appealed in both cases and asked this court to stay the permanent injunction in the *Sierra Club* case based on the same briefing and argument that had been presented in the preliminary injunction appeal in that case. California and New Mexico timely cross-appealed nine days later. On July 3, 2019, this court consolidated Defendants' appeal of the judgment and permanent injunction in the *Sierra Club* case with Defendants' pending appeal of the preliminary injunction.[2] That same day, a motions panel of this court issued a 2–1 published decision denying Defendants' motion for a stay of the permanent injunction (which had overtaken the preliminary injunction). *See Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

Defendants then applied to the Supreme Court for a stay of the permanent injunction pending appeal, which the Court granted on July 26, 2019. *See Trump v. Sierra Club*, —— U.S. ——, 140 S. Ct. 1, 204 L.Ed.2d 1170 (2019). That stay remains in effect "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." *Id.* at 1. In granting the stay, the Court concluded that "the Government has made a sufficient showing at this stage that [the Sierra Club and SBCC] have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.*

II

The Government has not contested the Article III standing of California and New Mexico on appeal, but as the majority notes, " 'the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.' " *See*Maj. Opin. at —— n.10 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009)). As "an indispensable part of the plaintiff's case, each element" of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife* (*Lujan v. Defenders*), 504 U.S. 555, 561, 112 S.Ct. 2130 (1992). Thus, although well-pleaded allegations are enough at the motion-to-dismiss stage, they are insufficient to establish standing at the summary-judgment stage. *Id.* "In response to a summary judgment motion, ... the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (simplified). [3]

***21** In reviewing standing *sua sponte* in the context of cross-motions for summary judgment, it is appropriate to apply the more lenient standard that takes the *plaintiffs'* evidence as true and then asks whether a reasonable trier of fact could find Article III standing. *Lujan v. Defenders*, 504 U.S. at 563, 112 S.Ct. 2130 (applying this standard in evaluating whether Government's cross-motion for summary judgment should have been granted). In their briefs below concerning the parties' cross-motions, California and New Mexico asserted that Defendants' allegedly unlawful conduct caused both harm to the States' sovereign interests in enforcing their environmental laws as well as actual environmental harm to animals and plants within the States. I agree that at least the second of these two asserted injuries—the threatened occurrence of actual environmental harm—is sufficient to establish Article III standing in this case, at least as to California. [4] Although the district court correctly recognized that the States' evidence of injury was very thin, *see infra* note 6, California's evidence is sufficient to establish standing at the summary-judgment stage.

Even assuming *arguendo* that the States must show a threat of injury to a protected *species* within their borders, rather than merely injury to individual animals or plants belonging to such a species, [5] I think that California has made a sufficient showing. Accepting the States' evidence as true, and drawing all reasonable inferences in their favor, a reasonable trier of fact could conclude that the construction activities associated with El Centro Sector Project 1 in California could materially adversely affect the local population of flat-tailed horned lizards, which California has classified as a "Species of Special Concern." Specifically, California presented declarations from two biologists explaining how DoD's construction activities, and the resulting border barrier, would materially harm the lizard population by increasing opportunities for natural predators to catch lizards, by creating a "genetic break" between the populations within the species' small range area on either side of the barrier, and by accidentally killing a potentially significant number of lizards during the construction itself. This evidence is sufficient to establish an injury-in-fact to California's environmental interests. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 521, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (significant harm to ecosystem is an injury to the State for Article III standing purposes). [6]

***22** California's showing of a material risk to a "Species of Special Concern" is fairly traceable to the challenged funding transfers and would be redressed by a favorable decision. *Lujan v. Defenders*, 504 U.S. at 560–61, 112 S.Ct. 2130. It therefore suffices to give us Article III jurisdiction to address the merits of the States' causes of action. We thus may proceed to do so without having to address New Mexico's standing. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."). And given my view that the States' legal challenges fail, I perceive no obstacle to entering judgment against *both* California and New Mexico without determining whether the latter has standing. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). [7]

III

Our first task is to determine whether the States have asserted a viable cause of action that properly brings the lawfulness of the transfers before us. *See Air Courier Conf. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530–31, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991). The majority holds that

California and New Mexico have a valid cause of action under the APA. *See*Maj. Opin. at ——. I disagree with that conclusion, and I also disagree with the States' alternative arguments that they may assert either an equitable cause of action under the Constitution or an "ultra vires" cause of action. [8]

A

***23** In authorizing suit by any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the APA incorporates the familiar zone-of-interests test, which reflects a background principle of law that always "applies unless it is expressly negated," *Bennett v. Spear*, 520 U.S. 154, 163, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). [9] That test requires a plaintiff to "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. NWF*, 497 U.S. at 883, 110 S.Ct. 3177 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396–97, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)). This test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399, 107 S.Ct. 750. Because the APA was intended to confer "generous review" of agency action, the zone-of-interests test is more flexibly applied under that statute than elsewhere, and it requires only a showing that the plaintiff is "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp* (*Data Processing*), 397 U.S. 150, 153, 156, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (emphasis added); *see also Bennett*, 520 U.S. at 163, 117 S.Ct. 1154 ("what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes") (simplified). Because an APA plaintiff need only show that its interests are "arguably" within the relevant zone of interests, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225, 132 S.Ct. 2199, 183 L.Ed.2d 211 (2012). Although these standards are generous, the States have failed to satisfy them.

1

In applying the zone-of-interests test, we must first identify the "statutory provision whose violation forms the legal basis for [the] complaint" or the "gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 883, 886, 110 S.Ct. 3177; *see also Air Courier Conf.*, 498 U.S. at 529, 111 S.Ct. 913. That question is easy here. The States' complaint alleges that the transfers made by DoD "do not satisfy the criteria under section 8005"; that Defendants therefore "have acted ultra vires in seeking to transfer funding pursuant to section 8005"; that DoD consequently "acted unconstitutionally and in excess of [its] statutory authority in diverting federal funds" pursuant to § 8005; and that therefore "these actions are unlawful and should be set aside under 5 U.S.C. section 706." [10] Section 8005 is plainly the "gravamen of the complaint," and it therefore defines the applicable zone of interests. *Lujan v. NWF*, 497 U.S. at 886, 110 S.Ct. 3177.

Although the States invoke the Appropriations Clause and the constitutional separation of powers in contending that Defendants' actions are "unlawful" within the meaning of the APA, any such constitutional violations here can be said to have occurred *only if* the transfers violated the limitations set forth in § 8005: if Congress authorized DoD to transfer the appropriated funds from one account to another, and to spend them accordingly, then the money has been spent "in Consequence of Appropriations made by Law," U.S. CONST. art. I, § 9, cl. 7, and the Executive has not otherwise transgressed the separation of powers. [11] *All* of California's theories for challenging the transfers under the APA—whether styled as constitutional claims or as statutory claims—thus rise or fall based on whether DoD has transgressed the limitations on transfers set forth in § 8005. As a result, § 8005 is obviously the "statute whose violation is the gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 886, 110 S.Ct. 3177. To maintain a claim under the APA, therefore, California must establish that it is within the zone of interests of § 8005. On this point, the majority and I are in apparent agreement. *See*Maj. Opin. at —— – ——. [12]

2

***24** Having identified the relevant statute, our next task is to "discern the interests arguably to be protected by the statutory provision at issue" and then to "inquire whether the

plaintiff's interests affected by the agency action in question are among them." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.* (*NCUA*), 522 U.S. 479, 492, 118 S.Ct. 927, 140 L.Ed.2d 1 (1998) (simplified). Identifying the interests protected by § 8005 is not difficult, and here the States' asserted interests are not among them.

Section 8005 is a grant of general transfer authority that allows the Secretary of Defense, if he determines "that such action is necessary in the national interest" and if the Office of Management and Budget approves, to transfer from one DoD "appropriation" into another up to $4 billion of the funds that have been appropriated under the DoD Appropriations Act "for military functions (except military construction)." *See* 132 Stat. at 2999. Section 8005 contains five provisos that further regulate this transfer authority, and the only limitations on the Secretary's authority that the States claim were violated here are all contained in the first such proviso. That proviso states that "such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.* [13] The remaining provisos require prompt notice to Congress "of all transfers made pursuant to this authority or any other authority in this Act"; proscribe the use of funds to make requests to the Committees on Appropriations for reprogrammings that are inconsistent with the restrictions described in the first proviso; set a time limit for making requests for multiple reprogrammings; and exempt "transfers among military personnel appropriations" from counting towards the $4 billion limit. *Id*.

Focusing on "the particular provision of law upon which the plaintiff relies," *Bennett*, 520 U.S. at 175–76, 117 S.Ct. 1154, makes clear that § 8005 as a whole, and its first proviso in particular, are aimed at tightening congressional control over the appropriations process. The first proviso's general prohibition on transferring funds for any item that "has been denied by the Congress" is, on its face, a prohibition on using the transfer authority to effectively reverse Congress's specific decision to deny funds to DoD for that item. 132 Stat. at 2999. The second major limitation imposed by the first proviso states that the transfer authority is not to be used unless, considering the items "for which [the funds were] originally appropriated," there are "higher priority items" for which the funds should now be used in light of "military requirements" that were "unforeseen" in DoD's request for Fiscal Year 2019 appropriations. *Id*. The obvious focus of this restriction is likewise to protect congressional judgments about appropriations by (1) restricting DoD's ability to *reprioritize* the use of funds differently from how Congress decided to do so and (2) precluding DoD from transferring funds appropriated by Congress for "military functions" for purposes that do not reflect "military requirements." The remaining provisos, including the congressional reporting requirement, all similarly aim to maintain congressional control over appropriations. And all of the operative restrictions in § 8005 that the States invoke here are focused *solely* on limiting DoD's ability to use the transfer authority to reverse the congressional judgments reflected in *DoD's* appropriations.

***25** In addition to preserving congressional control over DoD's appropriations, § 8005 also aims to give DoD some measure of flexibility to make necessary changes. Notably, in authorizing the Secretary to make transfers among appropriations, § 8005's first proviso specifies only *one* criterion that he must consider in exercising that discretion: he must determine whether the item for which the funds will be used is a "*higher priority* item[ ]" in light of "unforeseen *military* requirements." 132 Stat. at 2999 (emphasis added). Under the statute, he need not consider any other factor concerning either the original use for which the funds were appropriated or the new use to which they will now be put.

In light of these features of § 8005, the "interests" that the States claim are "affected by the agency action in question" are not "among" the "interests arguably to be protected" by § 8005. *NCUA*, 522 U.S. at 492, 118 S.Ct. 927 (simplified). In particular, the States' asserted environmental interests clearly lie outside the zone of interests protected by § 8005. The statute does not mention environmental interests, nor does it require the Secretary to consider such interests. On the contrary, the statute requires him only to consider whether an item is a "higher priority" in light of "military requirements," and it is otherwise entirely neutral as to the uses to which the funds will be put. Indeed, that neutrality is reflected on the face of the statute, which says that, once the transfer is made, the funds are "merged with and ... available *for the same purposes*, and for the same time period, *as the appropriation or fund to which transferred*." 132 Stat. at 2999 (emphasis added). Because the alleged environmental harms that the States assert here play no role in the analysis that § 8005 requires the Secretary to conduct, and are not among the harms that § 8005's limitations seek to address or protect, the States' interests in avoiding these harms are not within § 8005's zone of interests.

Moreover, focusing on the specific interests for which the States have presented sufficient evidentiary support at the summary-judgment stage, *see Lujan v. NWF*, 497 U.S. at 884–85, 110 S.Ct. 3177, further confirms that, in deciding whether to redirect excess military personnel funds under § 8005 to assist DHS by building fencing to stop international drug smuggling, the Acting Secretary of Defense did not have to give even the slightest consideration to whether that reprogramming of funds would result in the death of more flat-tailed horned lizards.[14] Put simply, the States' environmental interests are " 'so marginally related to ... the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " *Patchak*, 567 U.S. at 225, 132 S.Ct. 2199 (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750).

For similar reasons, the States' invocation of their *sovereign* interests is also insufficient. The majority finds that these interests "app[ly] with particular force" because the Secretary's transfer of funds *ultimately* had an effect on "California's and New Mexico's ability to enforce their state environmental laws," *see*Maj. Opin. at ——, but that consideration plays no role—not even indirectly—in the analysis that § 8005 requires. Section 8005 authorizes the Secretary to move funds from one appropriation to another if (1) that transfer is consistent with the appropriations-process-based constraints discussed earlier; and (2) the transfer is for items that the Secretary deems to be "higher priority" in light of "military requirements." 132 Stat. at 2999. The statute does not itself mention or contemplate the displacement of state laws as a result of the transfer, nor does it require that any such derogation from state sovereignty be considered in evaluating the proposed transfer. Moreover, here the ultimate preemption of state law occurred, not as a result of § 8005, but rather as a result of DHS's separate determination, under a completely separate statute (*viz.*, IIRIRA § 102(c)), that state (and federal) environmental laws would be waived. The States might perhaps be within the zone of interests with respect to *that* statute, but they do not challenge the validity of that waiver under § 102(c) in this case, and in any event, California has already brought (and lost) a challenge to an earlier § 102(c) waiver with respect to a similar border fencing project. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213 (9th Cir. 2019).

***26** The States nonetheless insist that they are within § 8005's zone of interests because the actual *activities* that are taking place under the valid waiver, in derogation of their sovereignty, are only occurring because the § 8005 transfer was approved. This argument fails. Once a valid § 102(c) waiver has been issued, the States' laws have been definitively set aside as a *de jure* matter under the Supremacy Clause, and halting construction will *not* bring those laws back into force or redress that injury to the States' sovereignty. The residual interest on which the States rely, therefore, is not an injury to their sovereignty, but merely the interest in ensuring that activities that the States consider undesirable do not occur. But the Supreme Court has consistently held that "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning," *Lujan v. Defenders*, 504 U.S. at 576, 112 S.Ct. 2130 (simplified), and an interest that is not cognizable for Article III purposes is irrelevant for zone-of-interests purposes as well, *Sierra Club v. Morton*, 405 U.S. 727, 733, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Similarly, to the extent that the States rely on an interest in "hav[ing] the Government act in accordance with law" such as § 8005, *see Lujan v. Defenders*, 504 U.S. at 575, 112 S.Ct. 2130, such an interest is not cognizable under Article III and cannot satisfy the zone-of-interests test here.

3

The majority makes two main arguments as to why the States nonetheless fall within § 8005's zone of interests, but neither has merit.

First, the majority contends that "the states regularly benefit from DoD's use of Section 8005," and it cites several past examples in which the statute was used to transfer funds that allowed the military to assist in addressing storm damage from hurricanes that occurred in various States. *See*Maj. Opin. at —— – ——. This argument is foreclosed by the Supreme Court's decision in *Lujan v. NWF*. The Court in that case held that, because satisfaction of the zone-of-interests test is an element of the cause of action that the plaintiff seeks to invoke, the plaintiff at the summary-judgment stage has the burden "to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms," *i.e.*, that "the injury he complains of (*his* aggrievement, or the adverse effect *upon him*)" falls within the relevant statute's zone of interests. 497 U.S. at 883–84, 110 S.Ct. 3177. Here, in opposing summary judgment, California and New Mexico made no showing whatsoever that, in the absence of these transfers to the "Drug Interdiction

and Counter-Drug Activities, Defense" appropriation, the funds in question would otherwise have been transferred for the direct benefit of either State. Absent such an evidentiary showing, the States have failed to show that they satisfy the zone-of-interests test under such a theory. *Id*. at 882–99, 110 S.Ct. 3177 (exhaustively analyzing the evidence presented at summary judgment and concluding that the plaintiffs had failed to carry their burden under the zone-of-interests test).

Second, the majority asserts that California and New Mexico fall within § 8005's zone of interests because § 8005 was "primarily intended to benefit [Congress] and its constitutional power to manage appropriations," and the States' "interests are *congruent* with those of Congress." *See*Maj. Opin. at ——– – ——(emphasis added). This theory also fails. As the Supreme Court made clear in *Lujan v. NWF*, the zone-of-interests test requires the plaintiff to make a factual showing that the plaintiff itself, or someone else whose interests the plaintiff may properly assert, has a cognizable interest that falls within the relevant statute's zone of interests. 497 U.S. at 885–99, 110 S.Ct. 3177 (addressing whether the interests of NWF—or of any of its members, whose interests NWF could validly assert under the associational standing doctrine of *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)—had been shown to be within the relevant zone of interests). I am aware of no precedent that would support the view that California and New Mexico can *represent* the interests of Congress (akin to NWF's representation of the interests of its members), much less that the States can do so merely because they are sympathetic to Congress's perceived policy objectives. [15] But I do not read the majority opinion as actually relying on such a novel theory. Instead, the majority suggests that, merely because the States' overall litigation objectives here are sufficiently congruent with those of Congress, the States have thereby satisfied the zone-of-interests test with respect to the States' *own* interests. This contention is clearly wrong.

***27** The critical flaw in the majority's analysis is that it rests, not on the *interests* asserted by the States (preservation of the flat-tailed horned lizard, etc.), but on the *legal theory* that the States invoke to protect those interests here. But the zone-of-interests test focuses on the former and not the latter. *See Lujan v. NWF*, 497 U.S. at 885–89, 110 S.Ct. 3177. Indeed, if the majority were correct, that would effectively eliminate the zone-of-interests test. By definition, *anyone* who alleges a violation of a particular statute has thereby invoked a legal theory that is "congruent" with the interests of those *other* persons or entities who *are* within that statute's zone-of-interests. Such a tautological congruence between the States' legal theory and Congress's institutional interests is not sufficient to satisfy the zone-of-interests test here.

The majority suggests that its approach is supported by the D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), *see*Maj. Opin. at ——, but that is wrong. As the opinion in that case makes clear, the D.C. Circuit was relying on the same traditional zone-of-interests test, under which a plaintiff's interests are "outside the statute's 'zone of interests' only 'if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' " 87 F.3d at 1360 (quoting *Clarke*, 479 U.S. at 399, 107 S.Ct. 750). The court mentioned "congruence" in the course of explaining why the plaintiff's interests in that case were "not more likely to frustrate than to further statutory objectives," *i.e.*, why those interests were not *inconsistent* with the purposes implicit in the statute. *Id*. (simplified). It did not thereby suggest—and could not properly have suggested—that the mere lack of any such inconsistency is alone sufficient under the zone-of-interests test. Here, the problem is not that the States' interests are inconsistent with the purposes of § 8005, but rather that they are too "marginally related" to those purposes. *See supra* at ——– – ——.

Lastly, the majority suggests that we must apply the zone-of-interests test "broadly in this context," because—given the difficulties that congressional plaintiffs have in establishing Article III standing—otherwise "no agency action taken pursuant to Section 8005 could ever be challenged under the APA." *See*Maj. Opin. at ——, ——. The assumption that no one will ever be able to sue for any violation of § 8005 seems doubtful, *cf. Sierra Club v. Trump*, 929 F.3d at 715 (N.R. Smith, J., dissenting) (suggesting that "those who would have been entitled to the funds as originally appropriated" may be within the zone of interests of § 8005), but in any event, we are not entitled to bend the otherwise applicable—and already lenient—standards to ensure that someone will be able to sue in this case or others like it.

B

In addition to asserting claims under the APA, California and New Mexico also purport to assert claims under the Constitution, as well as an equitable cause of action to enjoin

"ultra vires" conduct. The States do not have a cause of action under either of these theories.

1

The States contend that they are not required to satisfy any zone-of-interests test to the extent that they assert non-APA causes of action to enjoin Executive officials from taking *unconstitutional* action. [16] Even assuming that an equitable cause of action to enjoin unconstitutional conduct exists alongside the APA's cause of action, *see Juliana v. United States*, 947 F.3d 1159, 1167–68 (9th Cir. 2020); *Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017); *but see Sierra Club v. Trump*, 929 F.3d at 715–17 (N.R. Smith, J., dissenting), it avails the States nothing here. The States have failed to allege the sort of constitutional claim that might give rise to such an equitable action, because their "constitutional" claim is effectively the very same § 8005-based claim dressed up in constitutional garb. And even if this claim counted as a "constitutional" one, it would still be governed by the same zone of interests defined by the relevant limitations in § 8005.

a

***28** The States assert two constitutional claims in their operative complaint: (1) that Defendants have violated the Presentment Clause, and the constitutional separation of powers more generally, by "unilaterally diverting funding that Congress already appropriated for other purposes to fund a border wall for which Congress has provided no appropriations"; and (2) that Defendants have violated the Appropriations Clause "by funding construction of the border wall with funds that were not appropriated for that purpose." As clarified in their subsequent briefing, the States assert both what I will call a "strong" form of these constitutional arguments and a more "limited" form. In its strong form, the States' argument is that, *even if § 8005 authorized the transfers in question here*, those transfers nonetheless violated the separation of powers, the Presentment Clause, and the Appropriations Clause. In its more limited form, the States' argument is that the transfers violated the separation of powers, the Presentment Clause, and the Appropriations Clause *because* the transfers were not authorized by § 8005.

I need not address whether the States have an equitable cause of action to assert the strong form of their constitutional argument, because in my view that argument on the merits is so "wholly insubstantial and frivolous" that it would not even give rise to federal jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946); *see also Steel Co.*, 523 U.S. at 89, 118 S.Ct. 1003. If § 8005 *allowed* the transfers here, then that necessarily means that the Executive has properly spent funds that Congress, by statute, has *appropriated* and allowed to be spent for *that* purpose. The States cite no authority for the extraordinary proposition that the Appropriations Clause itself constrains *Congress's* ability to give agencies latitude in how to spend appropriated funds, and I am aware of no such authority. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 192, 113 S.Ct. 2024, 124 L.Ed.2d 101 (1993) ("allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion"). And by transferring funds after finding that the statutory conditions for doing so are met, an agency thereby "execut[es] the policy that Congress had embodied in the statute" and does not unilaterally alter or repeal any law in violation of the Presentment Clause or the separation of powers. *See Clinton v. City of New York*, 524 U.S. 417, 444, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). If anything, it is the States' theory—that the federal courts must give effect to an alleged broader congressional judgment against border funding *regardless* of whether that judgment is embodied in binding statutory language—that would offend separation-of-powers principles.

That leaves only the more limited form of the States' argument, which is that, *if* § 8005 did not authorize the transfers, *then* the expenditures violated the Appropriations Clause, the Presentment Clause, and the separation of powers. Under *Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994), this theory—despite its constitutional garb—is properly classified as "a statutory one," *id.* at 474, 114 S.Ct. 1719. It therefore does not fall within the scope of the asserted non-APA equitable cause of action to enjoin *unconstitutional* conduct. [17]

In *Dalton*, the Court addressed a non-APA claim to enjoin Executive officials from implementing an allegedly unconstitutional Presidential decision to close certain military bases under the Defense Base Closure and Realignment Act of 1990. 511 U.S. at 471, 114 S.Ct. 1719. [18] But the claim in *Dalton* was not that the President had directly transgressed an applicable constitutional limitation; rather, the claim was that, *because* Executive officials "violated the procedural requirements" of the statute on which the President's decision ultimately rested, the President thereby

"act[ed] in excess of his statutory authority" and therefore "violate[d] the constitutional separation-of-powers doctrine." *Id.* at 471–72, 114 S.Ct. 1719. The Supreme Court rejected this effort to "eviscerat[e]" the well-established "distinction between claims that an official exceeded his *statutory* authority, on the one hand, and claims that he acted in violation of the *Constitution*, on the other." *Id.* at 474, 114 S.Ct. 1719 (emphasis added). As the Court explained, its "cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472, 114 S.Ct. 1719. The Court distinguished *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), on the ground that there "the Government disclaimed any statutory authority for the President's seizure of steel mills," and as a result the Constitution itself supplied the rule of decision for determining the legality of the President's actions. *Dalton*, 511 U.S. at 473, 114 S.Ct. 1719. Because the "only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces," *Youngstown* thus "necessarily turned on *whether the Constitution authorized* the President's actions." *Id.* (emphasis added). By contrast, given that the claim in *Dalton* was that the President had violated the Constitution *because* Executive officials had "violated the terms of the 1990 Act," the terms of that statute provided the applicable rule of decision and the claim was therefore "a statutory one." *Id.* at 474, 114 S.Ct. 1719. And because those claims sought to enjoin conduct on the grounds that it violated *statutory* requirements, it was subject to the "longstanding" limitation that non-APA "review is not available when the statute in question commits the decision to the discretion of the President." *Id.*

***29** Under *Dalton*, the States' purported "constitutional" claims—at least in their more limited version—are properly classified as *statutory* claims that do *not* fall within any non-APA cause of action to enjoin unconstitutional conduct. 511 U.S. at 474, 114 S.Ct. 1719. Here, as in *Dalton*, Defendants have "claimed" the "statutory authority" of § 8005, and any asserted violation of the Constitution would occur *only if, and only because,* Defendants' conduct is assertedly not authorized by § 8005. *Id.* at 473, 114 S.Ct. 1719. The rule of decision for *this* dispute is thus not supplied, as in *Youngstown*, by the Constitution; rather, it is supplied only by § 8005. *Id.* at 473–74, 114 S.Ct. 1719. Because these claims by the States are thus "statutory" under *Dalton*, they may only proceed, if at all, under an equitable cause of action to enjoin ultra vires conduct, and they would be subject to any limitations applicable to such claims. *Id.* at 474, 114 S.Ct. 1719. The States do assert such a fallback claim here, but it fails for the reasons I explain below. *See infra* at ——— – ———.

b

But even if the States' claims may properly be classified as *constitutional* ones for purposes of the particular equitable cause of action they invoke here, those claims would still fail.

To the extent that the States argue that the Constitution *itself* grants a cause of action allowing *any plaintiff with an Article III injury* to sue to enjoin an alleged violation of the Appropriations Clause, the Presentment Clause, or the separation of powers, there is no support for such a theory. None of the cases cited by the States involved putative plaintiffs, such as the States here, who are near the outer perimeter of Article III standing. On the contrary, these cases involved either allegedly unconstitutional agency actions *directly targeting* the claimants, *see Bond v. United States*, 564 U.S. 211, 225–26, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011) (criminal defendant challenged statute under which she was convicted on federalism and separation-of-powers grounds); *United States v. McIntosh*, 833 F.3d 1163, 1174–75 (9th Cir. 2016) (criminal defendants sought to enjoin, based on an appropriations rider and the Appropriations Clause, the Justice Department's expenditure of funds to prosecute them), or they involved a suit based on an express *statutory* cause of action, *see Clinton v. City of New York*, 524 U.S. at 428, 118 S.Ct. 2091 (noting that right of action was expressly conferred by 2 U.S.C. § 692(a)(1) (1996 ed.)).

Moreover, any claim that the Constitution *requires* recognizing, in this context, an equitable cause of action that extends to the outer limits of Article III seems difficult to square with the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 135 S.Ct. 1378, 191 L.Ed.2d 471 (2015). There, the Court rejected the view that the Supremacy Clause itself created a private right of action for equitable relief against preempted statutes, and instead held that any such equitable claim rested on "judge-made" remedies that are subject to "express and implied statutory limitations." *Id.* at 325–27, 135 S.Ct. 1378. The Supremacy Clause provides a particularly apt analogy here, because (like the Appropriations Clause) the asserted "unconstitutionality" of the challenged action generally depends upon whether it falls *within or outside the*

terms of a federal statute: a state statute is "unconstitutional under the Supremacy Clause" only if it is "contrary to federal law," *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1361–62 (9th Cir. 1998), and here, the transfers violated the Appropriations Clause only if they were barred by the limitations in § 8005. And just as the Supremacy Clause protects Congress's "broad discretion with regard to the enactment of laws," *Armstrong*, 575 U.S. at 325–26, 135 S.Ct. 1378, so too the Appropriations Clause protects "congressional control over funds in the Treasury," *McIntosh*, 833 F.3d at 1175. It is "unlikely that the Constitution gave Congress such broad discretion" to enact appropriations laws only to simultaneously "*require[ ]* Congress to permit the enforcement of its laws" by *any* "private actor[ ]" with even minimal Article III standing, thereby "*limit[ing]* Congress's power" to decide how "to enforce" the spending limitations it enacts. *Armstrong*, 575 U.S. at 325–26, 135 S.Ct. 1378.

***30** The Appropriations Clause thus does not itself create a constitutionally required cause of action that extends to the limits of Article III. On the contrary, any equitable cause of action to enforce that clause would rest on a "judge-made" remedy: as *Armstrong* observed, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. at 327, 135 S.Ct. 1378. At least where, as here, the contours of the applicable constitutional line (under the Appropriations Clause) are defined by and parallel a statutory line (under § 8005), any such judge-made equitable cause of action would be subject to "express and implied statutory limitations," as well as traditional limitations governing such equitable claims. *Id.*

One long-established " 'judicially self-imposed limit[ ] on the exercise of federal jurisdiction' "—including federal equitable jurisdiction—is the requirement "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 520 U.S. at 162, 117 S.Ct. 1154 (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). This limitation is *not* confined to the APA, but rather reflects a "prudential standing requirement[ ] of general application" that always "applies unless it is expressly negated" by Congress. *Id.* at 163, 117 S.Ct. 1154. [19] Because Congress has not expressly negated that test in any relevant respect, the States' equitable cause of action to enforce the Appropriations Clause here remains subject to the zone-of-interests test. *Cf. Thompson v. North American Stainless, LP*, 562 U.S. 170, 176–77, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011) (construing a cause of action as extending to "any person injured in the Article III sense" would often produce "absurd consequences" and is for that reason rarely done). And given the unique nature of an Appropriations Clause claim, as just discussed, *the line between constitutional and unconstitutional conduct* here is defined entirely by the limitations in § 8005, and therefore the relevant zone of interests for the States' Appropriations-Clause-based equitable claim remains defined by *those* limitations. The States are thus outside the applicable zone of interests for this claim as well.

In arguing for a contrary view, the States rely heavily on *United States v. McIntosh*, asserting that there we granted non-APA injunctive relief based on the Appropriations Clause without inquiring whether the claimants were within the zone of interests of the underlying appropriations statute. *McIntosh* cannot bear the considerable weight that the States place on it.

In *McIntosh*, we asserted interlocutory jurisdiction over the district courts' refusal to enjoin the expenditure of funds to prosecute the defendants—an expenditure that allegedly violated an appropriations rider barring the Justice Department from spending funds to prevent certain States from " 'implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.' " 833 F.3d at 1175; *see also id.* at 1172–73. We held that the defendants had Article III standing and that, if the Department was in fact "spending money in violation" of that rider in prosecuting the defendants, that would produce a violation of the Appropriations Clause that could be raised by the defendants in challenging their prosecutions. *Id.* at 1175. After construing the meaning of the rider, we then remanded the matter for a determination whether the rider was being violated. *Id.* at 1179. Contrary to the States' dog-that-didn't-bark theory, nothing can be gleaned from the fact that the zone-of-interests test was never discussed in *McIntosh*. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004) (" 'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' ") (quoting *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 69 L.Ed. 411 (1925)). Moreover, any such silence seems more likely to have been due to the fact that it was so overwhelmingly obvious that the defendants *were* within the rider's zone of interests that the point was incontestable and uncontested.

An asserted interest in not going to prison for *complying* with state medical-marijuana laws seems well within the zone of interests of a statute prohibiting interference with the implementation of such state laws.

2

***31** The only remaining question is whether the States may evade the APA's zone-of-interests test by asserting a non-APA claim for ultra vires conduct in excess of *statutory* authority. Even assuming that such a cause of action exists alongside the APA, *cf. Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 189–90 (D.C. Cir. 2006), I conclude that it would be subject to the same zone-of-interests limitations as the States' APA claims and therefore likewise fails.

For the same reasons discussed above, any such equitable cause of action rests on a judge-made remedy that is subject to the zone-of-interests test. *See supra* at —— – ——. The States identify no case from this court affirmatively holding that the zone-of-interests test does *not* apply to a non-APA equitable cause of action to enjoin conduct allegedly in excess of *statutory* authority, and I am aware of none. Indeed, it makes little sense, when evaluating a claim that Executive officials exceeded the *limitations* in a federal statute, not to ask whether the plaintiff is within the zone of interests protected by those statutory limitations. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (although plaintiff asserting ultra vires claim may not need to show that its interests "fall within the zones of interests of the constitutional and statutory *powers* invoked" by Executive officials, when "a particular constitutional or statutory provision was intended to protect persons like the litigant by *limiting* the authority conferred," then "the litigant's interest may be said to fall within the zone protected by the *limitation*") (emphasis added). [20]

* * *

Given that each of the States' asserted theories fail, the States lack any cause of action to challenge the DoD's transfer of funds under § 8005.

IV

Alternatively, even if the States had a cause of action, their claims would fail on the merits, because the challenged transfers did not violate § 8005 or § 9002. The States argue that the transfers violated the first proviso of § 8005, which states that the transfer authority granted by that section "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." 132 Stat. at 2999. The requirements of this proviso likewise limit the transfer authority under § 9002. *See id.* at 3042 (stating that the transfer authority in § 9002 is in addition to that specified in § 8005, but "is subject to the same terms and conditions as the authority provided in section 8005 of this Act"). The States argue, and the majority agrees, that two of the requirements in this proviso are not met, because (1) the transfers were for an item for which Congress has denied funding; and (2) they were not for "unforeseen military requirements." *See*Maj. Opin. at —— – ——. I disagree.

A

***32** The proviso states that the Secretary may not transfer funds for an admittedly "higher priority item[ ] ... than those for which originally appropriated" if "the item for which funds are requested has been denied by the Congress." 132 Stat. at 2999. In my view, the Secretary's transfers did not violate this condition.

Determining whether Congress "denied" the relevant "item" at issue here turns on the meaning of the phrase "the item for which funds are requested." According to the States, the relevant "item" should be broadly defined to include any "border barrier construction," and Congress should be held to have "denied" that item except to the extent that it appropriated funds for "primary pedestrian fencing" in § 230(a)(1) of the Department of Homeland Security Appropriations Act, 2019, *see*Pub. L. No. 116-6, Div. A, § 230(a)(1), 133 Stat. 13, 28 (2019). The States' reading is implausible, because it ignores the context of the appropriations process that § 8005 addresses.

As a provision designed to preserve Congress's authority over the appropriations process, § 8005's restriction on transfers can only be understood against the backdrop of that process and of the role of transfers and reprogrammings in it. *Home Depot U.S.A., Inc. v. Jackson*, —— U.S. ——, 139 S. Ct. 1743, 1748, 204 L.Ed.2d 34 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme.") (simplified). That process is usefully set forth in Chapter 2 of the GAO's authoritative *Principles of Federal Appropriations Law*, otherwise known as the "Red Book," and I borrow heavily from that treatise in setting forth that relevant context. *See Lincoln*, 508 U.S. at 192, 113 S.Ct. 2024 (citing Red Book in addressing suit challenging reallocation of funds).

While Congress ordinarily appropriates funds annually for agencies to use in specified amounts for enumerated purposes, Congress has also recognized that "a certain amount of flexibility" is sometimes warranted. *See* 2 U.S. GOV'T ACCOUNTABILITY OFF. ("GAO"), PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016 rev.) ("RED BOOK"), pt. B, § 7, 2016 WL 1275442, at *1. Two ways in which such flexibility may be achieved are through "transfer and reprogramming." *Id*. A "transfer"—which is the specific subject of § 8005—refers to "the shifting of funds between appropriations," and it is generally prohibited in the absence of specific statutory authority. *Id*.; *see also*31 U.S.C. § 1532. By contrast, a "reprogramming shifts funds *within* a single appropriation," and in the absence of specific statutory limitations on reprogramming, agencies have broad discretion to do so "as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation." *See*RED BOOK, 2016 WL 1275442, at *6 (emphasis added) (citing *Lincoln*, 508 U.S. at 192, 113 S.Ct. 2024). In contrast to a transfer —which is easy to identify, because it shifts funds between separate appropriations that are "well-defined and delineated with specific language in an appropriations act"—it is more difficult to identify what counts as a reprogramming within an appropriation, because the appropriations act itself "does not set forth the subdivisions that are relevant to determine whether an agency has reprogrammed funds." *See id.* at *6. There is only a need to identify a "reprogramming" when Congress has sought to place limits on an agency's ability to do so. *See*, *e.g.*, Pub. L. No. 111-80, § 712, 123 Stat. 2090, 2120–21 (2009) (requiring 15-days advance notice to Congress before certain "reprogramming[s] of funds" may be made by various agriculture-related agencies). In such cases, whether a shift of funds within an appropriation counts as a reprogramming is ordinarily determined by considering how the reallocation of funds compares to the allocation of funds that was contemplated during the appropriations process: "Typically, *the itemizations and categorizations in the agency's budget documents* as well as statements in committee reports and the President's budget submission, contain the subdivisions within an agency's appropriation that are relevant to determine whether an agency has reprogrammed funds." RED BOOK, 2016 WL 1275442, at *7 (emphasis added). GAO's Red Book illustrates the point with an example, drawn from a prior opinion letter:

> ***33** For instance, for FY 2012, the Commodity Futures Trading Commission (CFTC) received a single lump-sum appropriation. *Id.* CFTC's FY 2012 *budget request* included an *item* within that lump sum to fund an Office of Proceedings. A reprogramming would occur if CFTC shifted amounts that it had previously designated to carry out the functions of the Office of Proceedings to carry out *different* functions.

Id. (citing GAO, B-323792, *Commodity Futures Trading Commission—Reprogramming Notification* (Jan. 23, 2013)) (emphasis added).

Against this backdrop, the import of § 8005's first proviso is clear. In evaluating a transfer from one appropriation to another, the Secretary must justify the transfer, not at the broad level of each overall appropriation itself (*i.e.*, not by comparing the statutory appropriation category for "Drug Interdiction and Counter-Drug Activities, Defense" versus that for "Military Personnel, Army"), but rather at the same "*item*" level at which the Secretary would have to justify a reprogramming within an appropriation. *See*Pub. L. No. 115-245, Div. A, § 8005, 132 Stat. at 2999 (requiring Secretary to compare whether the item to which the transferred funds will be directed is a "higher priority" than the items "for which originally appropriated"). The point of reference for determining whether the destination "item" justifies the transfer is therefore, as with a reprogramming, "the itemizations and categorizations in the agency's budget documents as well as statements in committee reports and the President's budget submission." RED BOOK, 2016 WL 1275442, at *7.

Several features of the language of § 8005 confirm this reading. The statutory reference to "those [items] for which *originally* appropriated," 132 Stat. at 2999 (emphasis added), is unmistakably a reference to the familiar concept of the itemizations contained *within* the current appropriation, as set

forth in the already existing budgetary documents exchanged and generated during the appropriations process for DoD. *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248, 134 S.Ct. 852, 187 L.Ed.2d 744 (2014) ("It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.") (simplified). And because those "original[ ]" items are to be compared with the new "items" for which the transfer authority is to "be used," 132 Stat. at 2999, these latter "items" must likewise be understood as a reference to the destination items *within* the transferee DoD appropriation. *Law v. Siegel*, 571 U.S. 415, 422, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning").

The destination item is also referred to in the statute as "the item for which funds are *requested*," which is an unusual way to refer to a transfer that an agency approves on its own. 132 Stat. at 2999 (emphasis added). But the use of that term makes perfect sense when the language is again construed against the background of the appropriations process, because it is a common practice for agencies—despite the decision in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)—to "request" the appropriations committees' approval for transfers and reprogrammings as a matter of comity. *See Lincoln*, 508 U.S. at 193, 113 S.Ct. 2024 ("[W]e hardly need to note that an agency's decision to ignore congressional expectations [concerning the use of appropriations] may expose it to grave political consequences"). That reading is confirmed by § 8005's third proviso, which enforces the exclusivity of the first proviso by barring DoD from using any appropriated funds to "prepare or present a *request* to the Committees on Appropriations for reprogramming of funds," unless it meets the requirements of the first proviso. 132 Stat. at 2999 (emphasis added). This language also confirms what is already otherwise apparent, which is that any transfer under § 8005 is to be analyzed, and papered, as a request for "*reprogramming* of funds." *Id*. (emphasis added). Indeed, although DoD made a conscious decision to depart from the comity-based practice of making a request in this case, the House Committee on Appropriations nonetheless proceeded to construe DoD's notification of the transfer as a "requested reprogramming action" and "denie[d] the request." *See* House Comm. on Appropriations, *Press Release: Visclosky Denies Request to Use Defense Funds for Unauthorized Border Wall* (Mar. 27, 2019), https://appropriations.house.gov/news/press-releases/visclosky-denies-request-to-use-defense-funds-for-unauthorized-border-wall.

***34** For all of these reasons, the "items" at issue under § 8005 must be understood against the backdrop of the sort of familiar item-level analysis required in a budgetary reprogramming, and the benchmark for evaluating the proposed destination item is therefore, as with any reprogramming, the *original* allocation among items that is reflected in the records of the DoD appropriations process. Accordingly, when § 8005 requires a consideration of whether "the item for which funds are requested has been denied by the Congress," it is referring to whether Congress, *during DoD's appropriations process*, denied an "item" that corresponds to the "item for which funds are requested." Under that standard, this case is easy. The States do not contend (and could not contend) that Congress ever "denied" such an item to DoD during DoD's appropriations process.

Instead, the States argue that a grant of funds to *another* agency (DHS) in its appropriations, in an amount less than that agency requested, should be construed as a *denial* of an analogous item to DoD under its entirely separate authorities and appropriations. This disregards the appropriations-law context against which § 8005 must be construed, which makes clear that the relevant clause refers only to denials that are applicable to DoD within the context of *its* appropriations process. Taking into account the broader context of the political struggle between the President and the Congress over DHS's requests for border-barrier funding, the majority concludes that Congress thereby issued a "general denial" of "border wall" funding, which should be construed as "necessarily encompass[ing] narrower forms of denial—such as the denial of a Section 284 budgetary line item request." *See*Maj. Opin. at —— – ——. But § 8005's proviso only applies if, during the DoD appropriations process, such an item "has been denied by the Congress," 132 Stat. at 2999, and that manifestly did not occur here, given that (1) no such request was presented and denied during that process; and (2) indeed, that process *ended* several months *before* the ultimate "denial" that the majority claims we should now retroactively apply to DoD's transfer authority.

More fundamentally, the majority is quite wrong in positing that § 8005 assigns to us the task of discerning the contours of the larger political struggle between the President and the Congress over border-barrier funding (including by reviewing campaign speeches and the like), *see*Maj. Opin. at ——, and then giving legal effect to what we think,

based on that review, is "Congress's broad and resounding denial resulting in a 35-day partial government shutdown," *id*. at ——. Our job under § 8005 is the more modest one of determining whether a proposed item of DoD spending was presented to Congress, and "denied" by it, during DoD's appropriations process, and all agree that that did not occur here. Any action that Congress took in the separate appropriations process concerning DHS would create a "denial" as to DoD only if there is some language in the DHS Appropriations Act that somehow extends that Act's denial vis-à-vis DHS to *other* agencies. [21] But the only relevant limitation in that Act that even arguably extends beyond DHS is a prohibition on the construction of "pedestrian fencing" in five designated parks and refuge areas, *see*Pub. L. No. 116-6, Div. A, § 231, 133 Stat. at 28 ("None of the funds made available by this Act *or prior Acts* are available" for such construction) (emphasis added), but no one contends that this limitation is being violated here. Beyond that, it is not our role under § 8005 to give effect to a perceived big-picture "denial" that we think is implicit in the "real-world events in the months and years leading up to the 2019 appropriations bills." *Sierra Club v. Trump*, 929 F.3d at 691.

B

***35** The majority alternatively holds that, even if Congress did not deny the "item" in question, the transfers were still unlawful because the requirements invoked by the Secretary here to justify the transfers were neither "military" in nature nor "unforeseen." *See*Maj. Opin. at ——–——. The majority is wrong on both counts.

1

The DoD's provision of support for counterdrug activities under § 284 is plainly a "military" requirement within the meaning of § 8005. As the majority notes, § 8005 does not define the term "military," *see*Maj. Opin. at ——, and so the word should be given its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). In common parlance, the word "military" simply means "[o]f, relating to, or involving the armed forces." *Military*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Military*, AMERICAN HERITAGE DICTIONARY (5th ed. 2018) ("Of, relating to, or characteristic of members of the armed forces"; "Performed or supported by the armed forces"); *Military*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) ("WEBSTER'S THIRD") ("of or relating to soldiers, arms, or war"; "performed or made by armed forces"). Because Congress, by statute, has formally assigned to DoD the task of providing "support for the counterdrug activities" of other departments through the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," 10 U.S.C. § 284(a), (b)(7), that task "relat[es] to" and "involv[es] the armed forces," and is "[p]erformed or supported by the armed forces." As such, it is a "military" task. [22]

Two other textual clues support this conclusion. First, the chapter heading for the chapter of Title 10 that includes § 284 is entitled, "*Military Support* for Civilian Law Enforcement Agencies," thereby further confirming that the support authorized to be provided under § 284 counts as *military* support. *See Henderson v. Shinseki*, 562 U.S. 428, 439, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011) (title of subchapter aided in resolving ambiguity concerning provision in that subchapter). Second, the DoD Appropriations Act *itself* classifies the activities carried out under § 284 as "military" activities. The Act recognizes, on its face, that funds appropriated for "Drug Interdiction and Counter-Drug Activities, Defense," may be transferred *out* of that appropriation under § 8005. *See* DoD Appropriations Act, § 8007(b)(6), 132 Stat. at 3000 (exempting transfers of funds out of this appropriation from an otherwise applicable prohibition on transferring funds under § 8005). Given that the transfer authority granted by § 8005 applies *only* to "funds made available in this Act to the Department of Defense for *military* functions (except military construction)," 132 Stat. at 2999 (emphasis added), the Act necessarily deems funds in the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation to be for "military functions." The majority's insistence that such counter-drug functions are not "military" activities thus flatly contradicts the statute itself.

***36** The majority is also wrong in relying on the distinctive definition given in 10 U.S.C. § 2801 for the phrase "military construction." *See*Maj. Opin. at —— – ——. At the outset, this makes little sense, because § 8005 states on its face that it applies only to transfers between appropriations for "military *functions*" and *not* for "military construction." 132 Stat. at 2999 (emphasis added). Indeed, Congress has long handled appropriations for "military construction" separately from those for military functions, and it did so again for Fiscal Year 2019: appropriations for "military construction" were

made in a *separate* appropriations statute enacted one week before the DoD Appropriations Act. *See*Pub. L. No. 115-244, Div. C, Title I, 132 Stat. 2897, 2946 (2018). Of all the terms to consider in construing "military" for purposes of the DoD Appropriations Act, "military construction" may be the least appropriate.

Moreover, the majority fails to recognize that "military construction" is a term of art, with its own unique definition, and it therefore provides an inapt guide for trying to discern the meaning of "military" in a different phrase in a different context. Absent a special definition, one would have thought that the phrase "military construction" embraces any "construction" that is performed by or for the "military." *See supra* at —— (quoting definitions of "military"). But § 2801 more narrowly defines "military construction" as generally referring only to "construction ... carried out with respect to a military installation ... or any acquisition of land or construction of a defense access road," and it defines a "military installation" as a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801(a), (c)(4). Nothing about this distinctive definition of "military construction" creates or reflects a general gloss on the word "*military*," much less does it suggest that the ordinary meaning of "military" in other contexts carries all of this baggage with it. The majority's effort to import the specific features of this term of art ("military construction") into one of the *component* words of that phrase makes neither linguistic nor logical sense, and it is therefore irrelevant whether or not the § 284 activities at issue here meet that definition. [23]

The majority also contends that, even if the activities involved here are "military" ones, they still did not involve "military *requirements*." *See*Maj. Opin. at —— – ——(emphasis added). That is wrong. The term "requirement" is not limited to those tasks that DoD is *compelled* to undertake, nor is it limited to those actions that DoD undertakes *for itself*. The term also includes "something that is wanted or needed" or "something called for or demanded," *see Requirement*, WEBSTER'S THIRD; *see also Requirement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (listing, as an alternative definition, "[s]omething that someone needs or asks for"), and that readily applies to the request for assistance that was made to DoD in this case under § 284. We should be cautious before adopting an unduly crabbed reading of what constitutes a military "requirement," especially when Congress has explicitly assigned a task to the military, as it did in § 284. *Cf. Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) ("great deference" is generally given to the military's judgment of the importance of a military interest).

***37** Accordingly, DoD's provision of support to DHS under § 284 involves a "military requirement[ ]" within the meaning of § 8005. The majority errs in concluding otherwise.

2

The majority is likewise wrong in contending that DoD's need to provide assistance to DHS for these projects under § 284 was not "unforeseen" within the meaning of § 8005. *See*Maj. Opin. at —— – ——.

Once again, the majority fails to construe § 8005 against the backdrop of the appropriations process. In ordinary usage, "foresee" means "to see (as a future occurrence or development) as *certain or unavoidable*: look forward to *with assurance*." *Foresee*, WEBSTER'S THIRD (emphasis added). In the context of the appropriations process, an "item" has been *seen as certain or unavoidable* only if it is reflected in DoD's budgetary submissions or in Congress's review and revision of those submissions. Conversely, it is "unforeseen" if it is *not* reflected as an item in any of those materials. The Red Book confirms this understanding. In explaining the need for reprogramming, it quotes the Deputy Defense Secretary's statement that reprogramming allows agencies to respond to "unforeseen changes" that *are not reflected in the "budget estimates" on which the final appropriations are based*:

> "The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements."

RED BOOK, 2016 WL 1275442, at *5 (citation omitted). As the GAO has explained, the question is not whether a particular item "was unforeseen *in general*"; "[r]ather, the question under section 8005 is whether it was unforeseen at the time of the budget request and enactment of appropriations." U.S. GAO, B-330862, *Department of*

Defense—Availability of Appropriations for Border Fence Construction at 7–8 (Sept. 5, 2019) (emphasis added), https://www.gao.gov/assets/710/701176.pdf. Under this standard, the items at issue here were "unforeseen"; indeed, the States do not contend that funding for the DoD assistance at issue here was ever requested, proposed, or considered during DoD's appropriations process.

In reaching a contrary conclusion, the majority makes two legal errors. First, it makes precisely the mistake the GAO identified, namely, it examines whether the "problem" (drug smuggling) and the "solution" (a border barrier) were foreseen *in general*, rather than whether they were foreseen *within the appropriations process*. *See*Maj. Opin. at ——– ——. Thus, in concluding that DoD's need to provide assistance under § 284 was not "unforeseen," the majority relies on the general premises that "the conditions at the border" have been known to be a problem since at least the 1960s and that "the President's position that a wall was needed to address those conditions" was publicly known well before he took office. *Id*. at ——, ——. Second, by rejecting the view that "foreseen" is equivalent to "known" or that it requires "actual knowledge," *id*. at ——– ——, the majority effectively rewrites the statute as if it said "*foreseeable*" rather than "foreseen." Contrary to the majority's view that requiring foreknowledge would "effectively eliminate[ ] any element of anticipation or expectation," *see id*. at ——, "foreseen" is commonly understood to be interchangeable with "foreknown." *See*, *e.g.*, *Foresee*, WEBSTER'S THIRD (listing "foreknow" as a synonym). By wrongly shifting the focus away from whether a current need matches up with the assumptions on which the budget and appropriations were based, the majority's errors would preclude DoD from making transfers based on *any* factors that were anticipated within the larger society and, as a result, would essentially reduce the transfer power in § 8005 to a nullity.

3

***38** DoD's transfers here were thus based on "military" "requirements" that were "unforeseen" within the meaning of § 8005. The States do not otherwise contest the Secretary's determination that the items in question were "higher priority" items than "those for which originally appropriated." This element of § 8005's first proviso was therefore also satisfied here.

C

The States contend that, even if the transfers complied with the conditions in § 8005, the particular transfer that was made under § 9002, *see supra* at ——– – ——, did not satisfy that section's additional requirement that transfers under that section be made only "between the appropriations or funds made available to the Department of Defense *in this title*." 132 Stat. at 3042 (emphasis added). According to the States, the appropriations under that title are only for "Overseas Contingency Operations," and the transferee appropriation does not count. This argument is plainly incorrect. The separate title in the DoD Appropriations Act that is entitled "Overseas Contingency Operations" contains within it a specific appropriation for "Drug Interdiction and Counter-Drug Activities, Defense," 132 Stat. at 3042, which is the appropriation to which the funds were transferred. The fact that the amounts in that fund are designated as funds for "Overseas Contingency Operations/Global War on Terrorism" *for purposes of calculating budgetary caps* under § 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901(b)(2)(A)(ii), does not thereby impose an additional limitation on the purposes for which such funds may be expended.

V

Based on the foregoing, I conclude that at least California has Article III standing, but that the States lack any cause of action to challenge these § 8005 and § 9002 transfers. Alternatively, if the States did have a cause of action, their claims fail on the merits as a matter of law because the transfers complied with the limitations in § 8005 and § 9002. I therefore would reverse the district court's partial grant of summary judgment to the States and would remand the matter with instructions to grant the Government's motion for summary judgment on this set of claims. Because the majority concludes otherwise, I respectfully dissent.

All Citations

--- F.3d ----, 2020 WL 3480841, 20 Cal. Daily Op. Serv. 6156, 2020 Daily Journal D.A.R. 6303

Footnotes

1 There are companion appeals concerning some of the same issues in *Sierra Club, et. al. v. Trump et. al.*, Nos. 19-16102 and 19-16300. Those appeals will be the subject of a separate opinion.

2 Some form of a physical barrier already exists at the site of some of the construction projects. In those places, construction would reinforce or rebuild the existing portions.

3 Subsequently, Congress adopted two joint resolutions terminating the President's emergency declaration pursuant to its authority under 50 U.S.C. § 1622(a)(1). The President vetoed each resolution, and Congress failed to override these vetoes.

4 Section 284 authorizes the Secretary of Defense to "provide support for the counterdrug activities ... of any other department or agency of the Federal Government" if it receives a request from "the official who has responsibility for the counterdrug activities." 10 U.S.C. §§ 284(a), 284(a)(1)(A). The statute permits, among other things, support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). DoD's provision of support for other agencies pursuant to Section 284 does not require the declaration of a national emergency.

5 For simplicity, because the transfer authorities are both subject to Section 8005's substantive requirements, this opinion refers to these authorities collectively as Section 8005, as did the district court and the motions panel. Our holding in this case therefore extends to both the transfer of funds pursuant to Section 8005 and Section 9002.

6 Section 9002 provides that: "Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act."

7 Specifically, the action was filed by the following states: California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, the Commonwealth of Virginia, and Attorney General Dana Nessel on behalf of the People of Michigan. The complaint was later amended to add the following states: Rhode Island, Vermont, Wisconsin, and the Commonwealth of Massachusetts. State parties are collectively referenced as "the States."

8 Both lawsuits named as defendants Donald J. Trump, President of the United States, Patrick M. Shanahan, former Acting Secretary of Defense, Kirstjen M. Nielsen, former Secretary of Homeland Security, and Steven Mnuchin, Secretary of the Treasury in their official capacities, along with numerous other Executive Branch officials (collectively referenced as "the Federal Defendants").

9 The Supreme Court subsequently granted a stay of the district court's permanent injunction in the separate companion case, *Trump v. Sierra Club*, —— U.S. ——, 140 S. Ct. 1, 204 L.Ed.2d 1170 (2019) (mem.).

10 The Federal Defendants do not challenge California's and New Mexico's Article III standing in these appeals. However, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).
The Federal Defendants challenged New Mexico's standing before the district court, but conflated its challenge with the APA "zone of interest" requirement, which we will discuss later. The district court held that New Mexico had established Article III standing.

11 A species of special concern is "a species, subspecies, or distinct population of an animal native to California that currently satisfies one or more of the following (but not necessarily mutually exclusive) criteria: is extirpated from the State ...; is listed as Federally-, but not State-, threatened or endangered; meets the State definition of threatened or endangered but has not formally been listed; is experiencing, or formerly experienced, serious (noncyclical) population declines or range retractions (not reversed) that, if continued or resumed, could qualify it for State threatened or endangered status; has naturally small populations exhibiting high susceptibility of to risk from any factor(s), that if realized, could lead to declines that would qualify it for State threatened or endangered status." CAL. DEPT. OF FISH AND WILDLIFE, SPECIES OF SPECIES CONCERN, https://wildlife.ca.gov/Conservation/SSC#394871324-what-is-the-relationship-between-sscs-and-the-california-wildlife-action-plan.

12 The States argue that they have both an equitable *ultra vires* cause of action and a cause of action under the APA. Although each of the claims can proceed separately, *see* *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th

Cir. 2017), we do not need to address the *ultra vires* claims here. The States seek the same scope of relief under both causes of action and they prevail under the APA.

13 As we explained with respect to Article III standing, California and New Mexico have provided sufficient evidence by declaration to establish that they have suffered cognizable injuries to their sovereign interests and that this injury is fairly traceable to the Federal Defendants' use of Section 8005.

14 Indeed, in DoD parlance, the possibility that border funding from the DoD budget might be requested was a "known unknown," as opposed to "unforeseeable," which would be an "unknown unknown," a category which former Secretary of Defense Rumsfeld described as including a "genuine surprise." DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR, p. xiv. (2011).

15 To be sure, Section 8005 states that it applies only to transfers between appropriations for "military functions," as opposed to the phrase "military construction" used in Section 2808. However, the statutes address similar subject matter, and it is of some significance that the Federal Defendants have invoked Section 2808 for functionally identical projects, claiming that such projects constitute "military construction" within the meaning of that statute, while also asserting that such projects satisfy the term "military" within the meaning of Section 8005. And, as we know, " 'statutes addressing the same subject matter' should be construed *in pari materia*." *Fed. Trade Comm'n v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 433 n.2 (9th Cir. 2018) (O'Scannlain, J., concurring) (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315, 126 S.Ct. 941, 163 L.Ed.2d 797 (2006)). Under that doctrine, related statutes should "be construed as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243, 93 S.Ct. 477, 34 L.Ed.2d 446 (1972) (quotations and citation omitted). Further, even apart from *in pari materia* considerations, the Supreme Court "has previously compared nonanalogous statutes to aid its interpretation of them." *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 105, 119 S.Ct. 1003, 143 L.Ed.2d 171 (1999) (O'Connor, J., dissenting) (citing *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131–32, 63 S.Ct. 494, 87 L.Ed. 656 (1943)).

1 By the time the district court ruled, DoD had decided not to use funds transferred under § 8005 for any construction in Yuma Sector Project 2, and so the request for a preliminary injunction as to that project was moot.

2 This court later consolidated the appeal and cross-appeal in the States' case with the already-consolidated appeals in the *Sierra Club* case.

3 I favor the general practice of reciting the language of the quoted source as if that source were stating those exact words for the first time, thereby disregarding any indicia of quotations within quotations (such as brackets, ellipses, and multiple layers of quotation marks). Going forward, I will use the word "simplified" rather than "cleaned up," because it seems less colloquial and it avoids suggesting that the more precise quotation format needed "cleaning." Of course, if I make any changes to the simplified quotation, then those would be shown with brackets or ellipses.

4 As the majority notes, *see*Maj. Opin. at —— n.10, the district court explicitly addressed Article III standing to challenge the transfers only in the context of New Mexico's request for a preliminary injunction. Although Article III standing was not revisited when both California and New Mexico subsequently moved for summary judgment and a permanent injunction, the States' showing of injury in support of a permanent injunction provides a sufficient basis for evaluating their Article III standing.

5 There are aspects to the States' arguments below—and of the majority opinion here—that seem implicitly to rest on the expansive view that the States would suffer cognizable injury-in-fact if there is harm to a *single* protected animal or to *any* of the plants in the construction area. Such theories push the outermost limits of plausible injury-in-fact, *cf*. *Lujan v. Defenders*, 504 U.S. at 566–67, 112 S.Ct. 2130, but it is unnecessary to rely on them here.

6 At the permanent-injunction stage, the district court found unpersuasive California's evidence of potential harm to this lizard species, especially when weighed against the Government's countervailing evidence of mitigation efforts. I do not necessarily disagree with that weighing of the competing evidence, but it addresses the injury issue in a different posture under different standards. The district court's denial of permanent injunctive relief reflected an exercise of *remedial discretion* after the court had found the transfers invalid as a matter of law. Accordingly, in weighing the States' evidence of injury in deciding how to exercise that discretion, the district court was not required to, and did not, evaluate the States' evidence of injury in the light most favorable to them (as we must do as to the standing issue here). *See Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994) (where district court granted summary judgment and permanent injunction, power to issue injunction was reviewed de novo, but "the district court's exercise of that power" was reviewed "for abuse of discretion").

7 By contrast, New Mexico's standing is relevant to the scope of relief that can be afforded if, as the majority concludes, the § 8005 and § 9002 transfers are *invalid*. California suffers no injury from the construction activities concerning the El Paso Sector Project 1, and so California lacks standing to request or obtain relief that extends to that separate project.

Lewis v. Casey, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). Accordingly, before affirming the district court's declaratory judgment that the use of funds transferred under § 8005 and § 9002 "for El Paso Sector Project 1 ... is unlawful," the majority properly examines New Mexico's standing. I express no view as to whether the majority is correct in concluding that New Mexico's evidence of environmental harm was sufficient, notwithstanding the district court's conclusion that this evidence rested largely on unsupported speculation. *See*Maj. Opin. at ——— – ———; *cf*. *California v. Trump*, 2019 WL 2715421, at *4 (N.D. Cal. June 28, 2019) ("New Mexico's speculation that a border barrier *might* prevent interbreeding, which *might* hamper genetic diversity, which *might* render Mexican wolves *more susceptible* to diseases falls far short of the necessary demonstrable evidence of harm to a protected species"). However, for the reasons expressed below, I disagree with the majority's conclusion that New Mexico and California have standing based on their inability to enforce their environmental laws. Maj. Opin. at ——— – ———. Given that this asserted injury is due to the Secretary of Homeland Security's waiver under § 102 of IIRIRA, and not to the funding transfers, it would not be redressed by an injunction aimed only at the transfers. *See infra* at ——— – ———.

8 In its merits analysis, the majority scarcely cites the motions panel's published decision, which addressed the Sierra Club's and SBCC's likelihood of success on the merits of many of the same issues before us. I agree with the majority's implicit conclusion that the motions panel's opinion does not prevent this merits panel from examining these issues afresh. Although the motions panel decision is a precedent, it remains subject to reconsideration by this court until we issue our mandate. *See United States v. Houser*, 804 F.2d 565, 567–68 (9th Cir. 1986) (distinguishing, on this point, between reconsideration of a prior panel's decision "during the course of a single appeal" and a decision "on a prior appeal"); *cf*. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (three-judge panel lacks authority to overrule a decision in a prior appeal in the same case). To the extent that *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015), suggests otherwise, that suggestion is dicta and directly contrary to our decision in *Houser*. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1261–65 (9th Cir. 2020). In all events, the precedential force of the motions panel's opinion was largely, if not entirely, vitiated by the Supreme Court's subsequent decision to grant the very stay that the motions panel's opinion denied.

9 The Supreme Court has not squarely addressed whether the zone-of-interests test applies to a plaintiff who claims to have "suffer[ed] legal wrong because of agency action," which is the other class of persons authorized to sue under the APA, 5 U.S.C. § 702. *See Lujan v. National Wildlife Fed.* (*Lujan v. NWF*), 497 U.S. 871, 882–83, 110 S.Ct. 3177 (1990). The States have not invoked any such theory here, so I have no occasion to address it.

10 Because the limitations on transfers set forth in § 8005 also apply to transfers under § 9002, *see* 132 Stat. at 3042, the parties use "§ 8005" to refer to both provisions, and I will generally do so as well.

11 The only possible exception is the States' argument that § 8005 *itself* violates the Appropriations Clause and the constitutional separation of powers. As explained below, that contention is frivolous. *See infra* at ——— – ———.

12 The States briefly contend that DoD has exceeded its authority under § 284, but even assuming *arguendo* that the States have a cause of action to raise such a challenge, it is patently without merit. The States note that § 284 contains a special reporting requirement for "small scale construction" projects, which are defined as projects costing $750,000 or less, 10 U.S.C. § 284(h)(1)(B), (i)(3), and they argue that this shows that Congress did not authorize projects on the scale at issue here. The inference is a non sequitur: the fact that Congress requires special reporting of these smaller projects does not mean that they are the *only* projects authorized. Congress may have imposed such a unique reporting requirement in order to capture the sort of smaller-scale activities that might otherwise have escaped its notice.

13 Similar language has been codified into permanent law. *See*10 U.S.C. § 2214(b). No party contends that § 2214(b) alters the relevant analysis under the comparably worded provision in § 8005.

14 It is unnecessary to exhaustively review whether California or New Mexico has provided the requisite factual support with respect to their claims of potential harms to *other* species of animals or plants, *see supra* note 7, because there is no basis in law or logic for concluding that it would make any difference to the zone-of-interests analysis under § 8005.

15 Even if the States could assert Congress's interests in some representational capacity, they could do so only if the injury to Congress's interests satisfied the requirements of Article III standing. *See Air Courier Conf.*, 498 U.S. at 523–24, 111 S.Ct. 913 (zone-of-interests test is applied to those injuries-in-fact that meet Article III requirements). I express no view on that question. *Cf*. *U.S. House of Reps. v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019) (holding that House lacks Article III standing to challenge the transfers at issue here), *appeal ordered heard en banc*, 2020 WL 1228477 (D.C. Cir. 2020).

16 It is not entirely clear that the States are contending that their *APA claims* to enjoin *unconstitutional* conduct, *see*5 U.S.C. § 706(2)(B), are exempt from the zone-of-interests test. To the extent that they are so contending, the point seems doubtful. *See Data Processing*, 397 U.S. at 153, 90 S.Ct. 827 (zone-of-interests test requires APA claimant to show that

its interest "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). But in all events, any such APA-based claim to enjoin unconstitutional conduct would fail for the same reasons as the States' purported free-standing equitable claim to enjoin such conduct.

17 There remains the States' claim that *statutory* violations may be enjoined under a non-APA ultra vires cause of action for equitable relief, but that also fails for the reasons discussed below. *See infra* at ——— – ———.

18 The plaintiffs in *Dalton* also asserted a claim under the APA itself, but that claim failed for the separate reason that the challenged final action was taken by the President personally, and the President is not an "agency" for purposes of the APA. *See*511 U.S. at 469, 114 S.Ct. 1719.

19 The States wrongly contend that, by quoting this language from *Bennett*, and stating that the zone-of-interests test therefore "applies to all *statutorily* created causes of action," *Lexmark*, 572 U.S. at 129, 134 S.Ct. 1377 (emphasis added), the Court in *Lexmark* thereby intended to signal that the test *only* applies to statutory claims and not to non-statutory equitable claims. Nothing in *Lexmark* actually suggests any such negative pregnant; instead, the Court's reference to "statutorily created causes of action" reflects nothing more than the fact that only statutory claims were before the Court in that case. *See id*. at 129, 134 S.Ct. 1377. Moreover, *Lexmark* notes that the zone-of-interests test's roots lie in the common law, *id*. at 130 n.5, 134 S.Ct. 1377, and *Bennett* (upon which *Lexmark* relied) states that the test reflects a "prudential standing requirement[ ] of general application" that applies to any "exercise of federal jurisdiction," 520 U.S. at 162–63, 117 S.Ct. 1154.

20 Even if the States were correct that the zone-of-interests test does not apply to a non-APA equitable cause of action, that would not necessarily mean that such equitable jurisdiction extends, as the States suggest, to the outer limits of Article III. Declining to apply the APA's generous zone-of-interests test might arguably render applicable the sort of narrower review of agency action that preceded the APA standards articulated in *Data Processing*, 397 U.S. at 153, 90 S.Ct. 827. *See also Clarke*, 479 U.S. at 400 n.16, 107 S.Ct. 750.

21 Nor is this a situation in which DoD is invoking the transfer authority to move funds *into DHS's appropriations*. The destination item here involves the authority under § 284 for *DoD* to undertake "[c]onstruction of roads and fences" along the border. 10 U.S.C. § 284(b)(7). Indeed, § 8045(a) of the DoD Appropriations Act specifically forbids DoD from "transferr[ing] to any other department" any funds available to it for "counter-drug activities," except "as specifically provided in an appropriations law." 132 Stat. at 3012.

22 The majority is wrong in suggesting that the Government has never argued that the construction projects "are related to the use of soldiers." *See*Maj. Opin. at ———. The Government affirmatively argues in its brief that "the *military* may be, and here is, required to assist in combatting" drug trafficking under § 284 (emphasis added). Moreover, the evidence submitted to the district court showed that the construction was to be carried out by the U.S. Army Corps of Engineers. Even granting that most of that agency's employees are civilians, the agency remains within the Department of the Army and is led by a military officer. *See*10 U.S.C. §§ 7011, 7036, 7063.

23 The majority notes that the phrase "military construction" is used in 10 U.S.C. § 2808, which "[t]he Federal Defendants have also invoked ... to fund other border wall construction projects on the southern border." Maj. Opin. at ———. But that statute was invoked only with respect to a *different* set of funds to be used for activities that Defendants contend *do* qualify as "military construction" for purposes of DoD's additional construction authority after a declaration of a national emergency. *See*10 U.S.C. § 2808(a). The States also challenged the use of that separate set of funds in their suit below, but these challenges form no part of the Rule 54(b) partial judgment now before us, and any issue concerning them has no bearing on the distinct questions presented here. Relatedly, the President's proclamation declaring such an emergency is relevant only to that other set of funds and has no legal bearing on the Secretary's transfers here. *Cf*. Maj. Opin. at ——— – ———, ———(discussing the declaration). And Congress's joint resolutions attempting to terminate the emergency declaration, *see id*. at ———, are irrelevant for the further reason that they were vetoed and never became law. *See id*. at ——— n.3; *see also*50 U.S.C. § 1622(a)(1) (congressional termination requires "enact[ing] into law a joint resolution terminating the emergency"); *Chadha*, 462 U.S. at 946–48, 103 S.Ct. 2764.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

COUNTY OF HUDSON, Appellant,
v.
STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS, Respondent.
Alberto Santos, Alexa Arce, Barbara Shery, Carol Doyle, Dave Krusznis, Eileen Eckel, Laura Pettigrew, Michael Landy, Susan McCurrie, Citizens and Taxpayers of Town of Kearny and State of New Jersey, and the Town of Kearny, Appellants,
v.
State of New Jersey Department of Corrections, Respondent.

Argued April 22, 2009.
|
Decided May 18, 2009.

On appeal from Executive Order No. 118, Issued September 22, 2000.

Attorneys and Law Firms

Steven L. Menaker argued the cause for appellant County of Hudson (Chasan, Leyner & Lamparello, PC, attorneys; Mr. Menaker and Kirstin Bohn, of counsel and on the joint brief).

Laura J. Wadleigh argued the cause for appellant Town of Kearny (Castano Quigley, LLC, attorneys; Ms. Wadleigh, of counsel and on the joint brief).

Mary Beth Wood, Senior Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney; Nancy Kaplen, Assistant Attorney General, of counsel; Ms. Wood, on the brief).

Before Judges CUFF, FISHER and BAXTER.

Opinion

PER CURIAM.

***1** We address in these consolidated appeals the continued viability of an executive order, issued in 2000, which mandated the continued temporary housing of sexually violent predators at the Hudson County Correctional Facility in Kearny (the Kearny facility). The failure to locate a housing alternative for the last nine years compels our holding that the circumstances upon which the executive order was based no longer constitute an emergency within the meaning of the Disaster Control Act, *N.J.S.A.* App. A:9-30 to -45, and that appellants are entitled to relief.

I

In 1998, the Legislature enacted the Sexually Violent Predator Act (SVPA), *N.J.S.A.* 30:4-27.24 to -27.38, which authorized the involuntary civil commitment of persons found to be sexually violent predators.[1] The SVPA placed with the Department of Corrections (DOC) the responsibility of operating a facility for "the custody, care and treatment" of SVPs. *N.J.S.A.* 30:4-27.34.

In April 1999, the DOC designated the Kearny facility, which at the time housed 311 minimum security inmates, as the only available site for the temporary housing of SVPs. A few months later, the County of Hudson filed a complaint, which alleged the DOC's failure to provide a fully-executed lease agreement or to pay rent for July, and obtained an order that required the DOC to show cause why the lease should not be terminated and the DOC enjoined from designating the Kearny facility as a location for the housing of SVPs. The trial court concluded that the County was under no obligation to lease the facility to the DOC and entered a judgment for possession, in favor of the County, on January 3, 2000; the judge stayed execution of the warrant of removal until March 31, 2000. We affirmed by way of an unpublished opinion, *County of Hudson v. Department of Corrections,* No. A-3008-99T1 (App. Div. June 21, 2000), and the trial judge thereafter issued a warrant of removal but continued to stay its execution until September 29, 2000.

On September 22, 2000, one week before the stay expired, Governor Christine Todd Whitman invoked her emergency powers, pursuant to the Disaster Control Act, and entered Executive Order 118. Governor Whitman declared in the order's preamble that approximately 120 SVPs were then housed in the Kearny facility, the number "will continue to increase," and the removal of the SVPs "from the Kearny facility will create a statewide emergency within the meaning

of the Disaster Control Act." As a result, Governor Whitman ordered:

> 1. Pursuant to the Disaster Control Act, the Kearny facility is hereby designated as a facility appropriate for the temporary housing of [SVPs] by the [DOC].
>
> 2. The Kearny facility will be used to house [SVPs] until there exists either other temporary facilities capable of and appropriate for the housing of all individuals committed pursuant to the [SVPA] or until a permanent facility capable of accommodating this population is constructed and operational.
>
> ***2** 3. Hudson County shall be compensated for the use of the Kearny facility consistent with the terms of the 1998 payment provisions of the lease; and
>
> 4. This Order shall take effect immediately.

The County applied in the trial court for an order that would require the DOC to demonstrate that Executive Order 118 was legitimately based on the Disaster Control Act. The trial judge determined that original jurisdiction over that issue laid with this court, causing the County to apply here for relief. We found that Executive Order 118 constituted a valid exercise of the authority provided by the Disaster Control Act. *County of Hudson v. State,* No. A-709-00T3 (App.Div. January 22, 2002).

II

On June 1, 2004, the County and the DOC filed a stipulation of settlement, which provided terms for the continued leasing of the Kearny facility and contained the County's stipulation not to challenge Executive Order 118 until December 31, 2006. When that deadline passed-and another year as well-without an indication from the DOC as to when the SVPs would be removed from the Kearny facility, the County filed a notice of appeal. The mayor and members of Kearny's town council, as well as Hudson County taxpayers, also filed a notice of appeal.[2] These appeals, which sought our review of the DOC's failure to take the action anticipated by the stipulation of settlement and which challenged the continued viability of Executive Order 118, were consolidated. We have jurisdiction over the issues presented in these consolidated appeals. *See County of Gloucester v. State,* 256 *N.J.Super.* 143, 148 (App.Div.1992), *aff'd as modified,* 132 *N.J.* 141 (1993).

The DOC thereafter filed a statement of the items constituting the record. *See R.* 2:5-4(b). Asserting that these items failed to provide a thorough understanding of the inadequacy of DOC's efforts in seeking an alternative to the Kearny facility, the County twice moved for a temporary remand for supplementation. We denied both applications.

Nevertheless, we deemed it advisable to explore at oral argument whether our disposition of the appeal would be benefited by further amplification of the DOC's efforts to relocate the SVPs. The DOC, which had opposed the earlier motions for supplementation, continued to oppose the idea; although it had previously argued otherwise, the County agreed that the documents comprising the record on appeal sufficiently demonstrate what the DOC has done since 2000. In short, the DOC argues that a hearing would produce nothing more of substance than appears in the static record, and the County contends that the existing record demonstrates the DOC's inadequate response to the problems that generated Executive Order 118. As a result of the parties' satisfaction with the content of the record on appeal, we will not force upon them additional proceedings they deem unnecessary. Moreover, we are concerned that the conduct of additional proceedings will only further delay identification of a permanent home for this State's SVPs. We, thus, resolve the issues presented by reference to the existing record on appeal.

III

***3** The Disaster Control Act was originally enacted in 1941 in order to empower the State's governor to assist the federal government in the war effort. *County of Gloucester v. State,* 132 *N.J.* 141, 144 (1993); *Worthington v. Fauver,* 88 *N.J.* 183, 192 (1982). The Act was amended on a number of occasions during the ten years that followed to broaden its scope, *Gloucester, supra,* 132 *N.J.* at 144, and now authorizes the governor to "utilize and employ" all available resources of the State and all political subdivisions, and, also, to commandeer private property and the personal services of private persons. *N.J.S.A.* App. A:9-34. To accomplish the Act's purposes, the governor is "empowered to make such orders ... as may be necessary adequately to meet the various problems presented by any emergency" on matters "that may be necessary to protect the health, safety, and welfare of the people or that will aid in the prevention of loss to and destruction of property." *N.J.S.A.* App. A:9-45i.

In considering whether an executive order is validly based on the Disaster Control Act, we must determine "(1) whether the current crisis constitutes an emergency within the meaning of the Disaster Control Act, and (2) whether the means chosen by the Governor to address the emergency are authorized by statute." *Worthington, supra,* 88 *N.J.* at 192. This requires an examination into "whether the Executive Order bears a rational relationship to the legislative goal of protecting the public" and whether the order is "closely tailored to the scope of the current emergency situation." *Id.* at 197-98.

In *Worthington,* the Court acknowledged that the governor was entitled to view prison overcrowding as an emergency within the meaning of the Disaster Control Act, and we made the same determination upholding Emergency Order 118 by way of our earlier unpublished opinion. The County does not presently question or seek our revisitation of that issue. Instead, the County argues that, even if viable when issued, Executive Order 118 can no longer stand because an inordinate amount of time has passed without the removal of the SVPs from the Kearny facility. The issue now before us, as it was for the Court in *Gloucester,* focuses on the *duration* of an executive order that was appropriately issued to deal with an emergent situation. In short, we must determine whether in 2009 it can be said that the emergency still exists in light of the fact that the SVPA was enacted in 1998 and Executive Order 118 issued in 2000.

In *Gloucester,* the Court considered the validity of the last of a series of executive orders, the first of which had issued twelve years earlier, as "a 'temporary' measure to combat prison overcrowding." 132 *N.J.* at 149. Recognizing that prison overcrowding remained "a pervasive problem," the Court held that "whether an 'emergency' exists requires a fact-specific analysis," which includes a consideration of "the passage of time, and other factors such as the extent to which the problem is within the government's control, and the extent to which remedial efforts have been undertaken." *Id.* at 150-51 (citations omitted).

***4** In following this approach, we recognize that the problem of relocating the SVPs from the Kearny facility is a matter within the government's control. It is also incontestable that a considerable period of time has elapsed since adoption of the SVPA in 1998 and issuance of Executive Order 118 in 2000. Nevertheless, the DOC contends that its pursuit of remedial efforts has been sufficiently diligent to warrant the continued viability of Executive Order 118. Although we do not question the DOC's good faith in attempting to find the perfect solution to the problem, we do not find its efforts to be commensurate with the emergent nature of the situation.

IV

The record on appeal demonstrates that the DOC has been active but not forceful-or, at least, not effectual-in finding a permanent solution to the problems that generated Executive Order 118. In August 1998, an architectural firm presented a plan to the DOC for the construction of a new 300-bed special treatment unit. State officials thereafter toured Minnesota's SVP facility, identifying several aspects of that facility that might prove beneficial to the DOC's existing proposal.

Consideration was given in September 1998 to building a facility on the grounds of East Jersey State Prison at an estimated cost of $20,000,000. Questions arose about the sufficiency of the estimate, followed by objections from the Township of Woodbridge, which commenced litigation and obtained an injunction halting the project.

The following month, discussions began in other locations. A site in Maurice River Township was identified as having potential, but was eventually opposed by the township.[3] And, in June 1999, a location in the Borough of Chesilhurst was considered. However, when State officials advised that a public hearing on the subject would be conducted, local residents and officials expressed intense opposition.

Little occurred with regard to the creation of a new facility until 2001 when the Department of Treasury requested that the architectural firm update and revise its 1998 study. The firm conducted a series of programming workshops with various officials in an attempt to reach a consensus on the program's needs; its comprehensive plan was presented on February 7, 2002. That plan estimated the cost of the structure at more than $65,000,000. The firm also estimated that the 455-bed facility would require twenty-five acres and estimated the entire cost of the project, including planning, design, construction, permitting and other costs, at more than $82,000,000. The plan was viewed as too expensive. In January 2006, the proposal was reconsidered. By that time, the cost estimate had risen to more than $114,000,000 and was again deemed too expensive.

Meanwhile, the adaptation of existing facilities was also explored. Starting in 2002, each of the DOC's facilities was

examined and reviewed for this purpose and each deemed unsuitable for a variety of reasons. The DOC considered its Central Reception and Assignment Facility (CRAF) in Trenton, determined it required major improvements to all its buildings, as well as a 17,030 square foot extension at a total cost of more than $17,000,000, and then realized that utilization of CRAF would give rise to a need to find alternate housing for CRAF's inmates.

***5** Utilization of the Mid-State Correctional Facility was complicated by the fact that the facility is located on federal property. As part of its realignment and closure of Fort Dix, the federal government imposed upon the property it had transferred to the DOC several conditions, which apparently raised concerns about a reversion of the property should it be used to house SVPs. The DOC also harbored concerns about the facility's size and perimeter security.

The grounds of the Albert C. Wagner Youth Correctional Facility in Bordentown consisted of one structure found to be too large (consisting of 846 beds), and other structures found too small. The Adult Diagnostic and Treatment Center in Avenel, which is the State's only sex offender prison, was considered. But the proposed facility, if located there, would require subdivision from the remaining population, *see N.J.S.A.* 30:4-27.34a, and another location for the prisoners there housed. [4]

The DOC also found problems with Bayside State Prison in Leesburg and Ancora Psychiatric Hospital in Winslow Township. Bayside consists of a 1,221-bed facility, deemed too large for the SVP population, and a farm with open barracks and cottage-type housing units, deemed too insecure for these purposes. Ancora consists of two separate housing units, with a total of 350 beds, separated by a walking and open recreation space, deemed insecure and unsuitable.

The DOC reconsidered CRAF in 2006; Jones Farm, a 282-bed satellite unit of CRAF was rejected as too small. On the other hand, East Jersey State Prison in Rahway, New Jersey State Prison in Trenton, Northern State Prison in Newark, Riverfront State Prison in Camden, and Edna Mahan Correctional Facility in Clinton, were considered too large. The main structure of Mountainview Youth Correctional Facility in Annandale was also considered too large, and its two satellite facilities were considered too small.

Other existing facilities presented similar problems. It is not surprising, in light of the nature of the assorted insufficiencies of the DOC's many facilities, that the County compares the DOC's dilemma in identifying an appropriate site to Goldilocks' quandary in "The Story of the Three Bears." [5] That is, the DOC has found some facilities too large, some too small, none just right.

More recently, as the DOC continued to explore its options, the level of opposition to any chosen locale was met with vociferous opposition. In May 2007, the DOC reconsidered its existing facilities and focused in particular on South Woods State Prison in Bridgeton, which was designated in 2003 as a location for the transition of inmates convicted of sex offenses. This proposal was met with an immediate objection from the Cumberland County Board of Chosen Freeholders. In a letter to the DOC Commissioner, the Freeholders indicated that they were "furious" the DOC was again considering placing the facility in Cumberland County, that in 2000 "our entire County was enraged that an ill-conceived plan was afoot to house sexual predators in Maurice River Township," and that seven years later, the County "once again targeted" Cumberland County for the placement of the facility at South Woods State Prison.

***6** The DOC has also explored the possibility of privatizing the housing of SVPs. The record on appeal reveals that those efforts were initially clouded by litigation and have not since resulted in any concrete proposal.

In examining the record on appeal, we recognize the difficulties presented to the DOC when the SVPA was enacted. The SVPA mandated that the DOC house civilly-committed SVPs in facilities separate from those housing prison inmates. Locating a proper site that conforms with the objectives of the SVPA has proven to be no small task. However, the record strongly suggests that the most daunting obstacle may not be the adaptation of existing facilities or even the construction of new facilities, but identification of an appropriate location. Every serious proposal has been met with litigation or intense objections.

We have not the slightest doubt that the vast majority of this State's citizens strongly approve of the SVPA and the housing of civilly-committed SVPs where they may be treated until conditions exist for their release-but not in their town. The lawsuit that gave rise to Executive Order 118, the lawsuit that followed regarding the plan to house SVPs in Woodbridge, and the great and constant outcry when the DOC gave serious consideration to placing the facility in Cumberland County,

demonstrate the incontestable fact that there is no location within the State in which such a facility will be welcomed.

The DOC seems content to allow vocal opposition to be an insurmountable obstacle. We are convinced that if the location of a permanent facility depends upon the finding of a volunteer, it will be a very long wait. The record on appeal is certainly subject to interpretation about the intensity and vigor of the DOC's efforts, but the record does demonstrate beyond any doubt a number of things: the DOC has weighed a great many options in seeking a resolution of the problem; the DOC has encountered great local resistance in ascertaining a suitable place for the facility; and the DOC's efforts have borne no fruit. Although we have no cause to share the County's view that the DOC's efforts have been "token, superficial and half-hearted," there can be no dispute that those efforts have been ineffectual. Moreover, the record provides no assurance or even hope that the status quo will change if we simply resolve to leave Executive Order 118 in place, as the DOC urges.

V

Newton's First Law of Motion states that an object in motion tends to stay in motion and that an object at rest tends to stay at rest unless acted upon by a net external force.[6] Although the DOC has revealed and explained its response to the emergency that prompted Executive Order 118, it appears the opposing voice of the people in those locations initially deemed feasible has brought DOC's ventures in those areas to a rest. We are persuaded that were we to fail to exert our own external force, the matter will remain at rest for the indefinite future.

***7** In the final analysis, the Disaster Control Act does not envision emergencies of indefinite duration. In *Gloucester* the Court contemplated the point at which gubernatorial action exceeds the authority permitted by the Disaster Control Act; when faced with a passage of time without effectual response similar to that which we consider here, the *Gloucester* Court held "[t]hat day has come." 132 *N.J.* at 149. Executive Order 118's time has also come. The DOC can no longer rely on the circumstances that generated Executive Order 118 as constituting an emergency within the meaning of the Disaster Control Act. Nearly nine years have passed since Governor Whitman issued the order. The circumstances have not changed, and nothing of substance has been accomplished during those nine years. It is now more than ten years since the Legislature enacted the SVPA, and no permanent home has yet been established for those who have been civilly committed.

Of course, we must recognize, as the Court recognized in *Gloucester,* that today's judgment "cannot be expected to cause an immediate change" in the circumstances, and "[s]ome considerable period of time for compliance must be given." 132 *N .J.* at 153 (quoting our opinion in the same case, 256 *N.J.Super.* at 152). We will allow one year from today for compliance with the judgment entered more than nine years ago that required the DOC's turnover of possession of the Kearny facility to the County of Hudson, and for the location of a temporary or permanent facility, or facilities, for the housing of SVPs in accordance with the terms of the SVPA.

Judgment in favor of appellants.

All Citations

Not Reported in A.2d, 2009 WL 1361546

Footnotes

1 The SVPA defines a sexually violent predator (SVP) as "a person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." *N.J.S.A.* 30:4-27.26.

2 We will collectively refer to all appellants as "the County."

3 Maurice River Township later passed a resolution supporting the location of a permanent facility on the grounds of Bayside State Prison, but within the month rescinded that resolution as a result of intense local opposition.

4 Any use of existing correctional facilities would necessarily require the relocation of current inmates, which also generates a cost to the DOC. *See N.J.S.A.* 30:4-27.34a (requiring that persons civilly committed pursuant to the SVPA "shall be

kept in a secure facility and shall be housed and managed separately from offenders in the custody of the [DOC] and, except for occasional instances of supervised incidental contact, shall be segregated from such offenders").

5 Robert Southey, *The Doctor* (1837).

6 Isaac Newton, *Philosophiae Naturalis Principia Mathematica* (1687).

STATE OF MICHIGAN

COURT OF CLAIMS

MICHIGAN HOUSE OF REPRESENTATIVES, and MICHIGAN SENATE,

Plaintiffs,

v

GOVERNOR GRETCHEN WHITMER,

Defendant.
_____/

OPINION AND ORDER

Case No. 20-000079-MZ

Hon. Cynthia Diane Stephens

This matter arises out of Executive Orders issued by Governor Gretchen Whitmer in response to the COVID-19 pandemic. Neither the parties to this case nor any of the amici deny the emergent and widespread impact of Covid-19 on the citizenry of this state. Neither do they ask this court at this time to address the policy questions surrounding the scope and extent of contents of the approximately 90 orders issued by the Governor since the initial declaration of emergency on March 10, 2020 in Executive Order No. 2020-4. The Michigan House of Representatives and the Michigan Senate (Legislature) in their institutional capacities challenge the validity of Executive Orders 2020-67 and 2020-68, which were issued on April 30, 2020. They have asked this court to declare those Orders and all that rest upon them to be invalid and without authority as written. The orders cited two statutes, 1976 PA 390, otherwise known as the Emergency Management Act (EMA); and 1945 PA 302, otherwise known as the Emergency Powers of Governor Act (EPGA). In addition, the orders cite Const 1963, art 1, § 5, which generally vests the executive power of the state in the Governor. This court finds that:

1. The issue of compliance with the verification language of MCL 600.6431 is abandoned.
2. The Michigan House of Representative and Michigan Senate have standing to pursue this case.
3. Executive Order 2020-67 is a valid exercise of authority under the EPGA and plaintiffs have not established any reason to invalidate any executive orders resting on EO 2020-67.
4. The EPGA is constitutionally valid.
5. Executive Order No. 2020-68 exceeded the authority of the Governor under the EMA.

I. BACKGROUND

The Court will dispense with a lengthy recitation of the pertinent facts and history and will instead jump to the Governor's declaration of a state of emergency[1] as well as a state of disaster[2] under the EMA and the EPGA on April 1, 2020, in response to the COVID-19 pandemic. Executive Order No. 2020-33. Both chambers of the Legislature adopted Senate Joint Resolution No. 24 which approved "an extension of the state of emergency and state of disaster declared by Governor Whitmer in Executive Order 2020-4 and Executive Order 2020-33 through April 30, 2020. . . ." The Senate Concurrent Resolution cited the 28-day legislative extension referenced in MCL 30.403 of the EMA.

[1] The EPGA does not define the term "state of emergency." However, the EMA defines the term as follows: "an executive order or proclamation that activates the emergency response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(q).

[2] While the EPGA does not use, let alone define, the term "state of disaster," the EMA defines the term as "an executive order or proclamation that activates the disaster response and recovery aspects of the state, local, and interjurisdictional emergency operations plans applicable to the counties or municipalities affected." MCL 30.402(p).

The public record affirms that the governor asked the legislative leadership to extend the state of disaster and emergency on April 27, 2020. The Legislature demurred and instead passed SB 858, a bill without immediate effect, which addressed some the subject matter of several of the COVID-19-related Executive Orders, but did not extend the state of emergency or disaster or the stay-at-home order. The Governor vetoed SB 858.

On April 30, 2020, the Governor issued Executive Order 2020-66 which terminated the state of emergency and disaster that had previously been declared under Executive Order 2020-33. The order opined that "the threat and danger posed to Michigan by the COVID-19 pandemic has by no means passed, *and the disaster and emergency conditions it has created still very much exist*." Executive Order No. 2020-66 (emphasis added). However, EO 2020-66 acknowledged that 28 days "have lapsed since [the Governor] declared states of emergency and disaster under the Emergency Management Act in Executive Order 2020-33." *Id.* The order declared there was a "clear and *ongoing* danger to the state . . . ." (Emphasis added).

On the same day, and only one minute later, the Governor issued two additional executive orders. First, she issued Executive Order No. 2020-67, which cited the EPGA. [In addition, the order contained a cursory citation to art 5, § 1.] EO 2020-67 noted the Governor's authority under the EPGA to declare a state of emergency during "'times of great public crisis . . . or similar public emergency within the state. . . .'" *Id*. quoting MCL 10.31(1). The order noted that such declaration does not have a fixed expiration date. *Id.* Then, and as a result of the ongoing COVID-19 pandemic, EO 2020-67 declared that a "state of emergency remains declared across the State of Michigan" under the EPGA. The order stated that "[a]ll previous orders that rested on Executive Order 2020-33 now rest on this order." *Id*. The order was to take immediate effect. *Id*.

In addition to declaring that a state of emergency "remained" under the EPGA, the Governor simultaneously issued Executive Order No. 2020-68; this order declared a state of emergency and a state of disaster under the EMA. [In addition, like all previous orders, the order contained a vague citation to art 5, § 1 as well.] Hence, EO 2020-68 essentially reiterated the very same states of emergency and disaster that the Governor had, approximately one minute earlier, declared terminated. The order declared that the states of emergency and disaster extended through May 28, 2020 at 11:59 p.m., and that all orders that had previously relied on the prior states of emergency and disaster declaration in EO 2020-33 now rest on this order, i.e., EO 2020-68.

The House of Representative and the Senate subsequently filed this case asking for an expedited hearing and a declaration that EO 2020-67 and EO 2020-68, and any other Executive Orders deriving their authority from the same, were null and void.

COMPLIANCE WITH MCL 600.6431

The Governor noted in her reply brief that the complaint, as originally filed in this court did not meet the verification requirement of MCL 600.6431(2)(d). At oral argument the Governor acknowledged that the verification requirements were not met when the complaint was originally filed; however, a subsequent filing was notarized in accordance with the statute. The Governor also acknowledged that the failure to sign the verified pleading before a person authorized to administer oaths was not necessary for invoking this Court's jurisdiction. Finally, the Governor agreed that she was not seeking dismissal of the action based on plaintiffs' initial lack of compliance. For those reasons this Court will consider the issue moot and decline any analysis of the arguments predicated on MCL 600.6431.

STANDING

The issue of standing is central to this case as it is with all litigation. Courts exist to manage actual controversies between parties to whom those controversies matter. The Legislature has cited MCR 2.605 in support of its standing to pursue this declaratory action. The Legislature asserts that it has a need for guidance from this Court in order to determine how it will proceed to protect what it articulates as its special institutional rights and responsibilities. The Governor challenges whether the Legislature has standing to bring this suit. The Governor argues that the institution of the Legislature has no more interest in the outcome of this suit than any member of the public. She further claims that the Legislature does not need the guidance of the Court to determine how to carry out its constitutional duties. It is the opinion of this Court that the Legislature has standing to pursue its claims before this Court.

Both parties cite the seminal case on the issue of standing, *Lansing Schs Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). In that case, the Supreme Court refined the concept of standing under the Michigan Constitution. In doing so, the Court rejected the federal standing analysis and articulated an analytical framework rooted the Michigan Constitution. The *Lansing Schs Ed Ass'n* Court looked to whether a cause of action was authorized by the Legislature. Where the Legislature did not confer a right to a specific cause of action, a plaintiff must have "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different than the citizenry at large . . . ." *Id*. at 372.

The Governor relies heavily on the recent case of *League of Women Voters of Mich v Secretary of State*, __ Mich App __; __ NW2d __ (2020) (Docket Nos. 350938; 351073), which is itself now on appeal to the Michigan Supreme Court. That case, similar to the instant case, was brought under the aegis of MCR 2.605 and asked the court to declare that an Attorney General Opinion's interpretation of a statute was invalid. The Court of Appeals majority in *League of*

Women Voters examined the issue through the lens of MCR 2.605 and found that in that case the institution of the Legislature had no standing: "Given the definition of 'actual controversy' for the purposes of MCR 2.605, we are not convinced that the Legislature has demonstrated standing to pursue a declaratory action here. No declaratory judgement is necessary to guide the Legislature's future conduct in order to preserve its legal rights." *Id.*, slip op at p. 7.

League of Women Voters was the first examination of the issue of institutional standing in Michigan. For that reason, the court focused on the logic of the Supreme Court's decision in *Dodak v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993), which analyzed a standing issue in relation to individual legislators. *Dodak*, like this case, presented a conflict between the executive and legislative branches of state government. That Court, like this one, is mindful that in such instances the issue of legislative standing requires a litigant to overcome "a heavy burden because, courts are reluctant to hear disputes that may interfere with the separation of powers between the branches of government." *League of Women Voters*, __ Mich App at __, slip op at p. 8 (citation and quotation marks omitted; cleaned up). There must be a "personal and legally cognizable interest peculiar" to the legislative body, rather than a "generalized grievance that the law is not being followed." *Id*. (citations and quotation marks omitted). In *Dodak* four legislators pressed a case concerning what they asserted was an abrogation of their individual rights as members of the appropriations committees when the State Administrative Board was allowed to redistribute funds allocated by the Legislature between departments of state government. Ultimately the Supreme Court found that the chair of the appropriation committee did in fact have a peculiar and special right and a potential for a personal injury sufficient to acquire standing. In *Dodak*, 441 Mich at 557, the Supreme Court cited with approval federal authorities holding that an individual legislator "'only has standing if he alleges a diminution of congressional influence

which amounts to a complete nullification of his vote, with no recourse in the legislative process.' Dodak, 441 Mich at 557, quoting *Chiles v Thornburgh*, 865 F3d 1197, 1207 (CA 11, 1989). In *League of Women Voters* the institution claimed its right was to have a constitutionally correct interpretation of certain legislation. The *League of Women Voters* Court found that indeed every citizen had such a right and the Legislature once it enacted a statute had no special relationship to it. *League of Women Voters*, __ Mich App at __, slip op at p. 8. The case did not, remarked the Court, concern the validity of any particular legislative member's vote. *Id*.

While it is a close question, this Court finds that the issue presented in this case is whether the Governor's issuance of EO 2020-67 and/or EO 2020-68 had the effect of nullifying the Legislature's decision to decline to extend the states of emergency/disaster. The United States Court of Appeals for the Sixth Circuit recently found that a legislative body under certain circumstances does have standing. See *Tennessee General Assembly v United States Dep't of State*, 931 F3d 499 (CA 6, 2019). The logic of their analysis is persuasive and compatible with both *Dodak* and *League of Women Voters*. In *Tennessee General Assembly*, the Sixth Circuit surveyed two cases from the Supreme Court of the United States to illustrate when a legislative body, or portion thereof, may have standing. *Id.* at 508, citing *Coleman v Miller*, 307 US 433; 59 S Ct 972; 83 L 3d 1385 (1939); and *Ariz State Legislature v Ariz Independent Redistricting Comm*, __ US __; 135 S Ct 2652; 192 L Ed 704 (2015). Surveying *Coleman* and its progeny, the Sixth Circuit explained that, "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Tennessee General Assembly*, 931 F3d at 509 (citation and quotation marks omitted). The Sixth Circuit further noted that *Arizona State Legislature* Court also conferred standing under article III to a legislature. In

that case, the legislature claimed that the power to redistrict accrued to them under the Arizona constitution. The challenged action in that case was "more similar to the 'nullification' injury in *Coleman*." *Tennessee General Assembly*, 931 F3d at 510, citing *Arizona State Legislature*, __ US at __; 135 S Ct at 2665. To that end, the proposal at issue would have completely nullified any legislative vote, and there was "a sufficiently concrete injury to the Legislature's interest in redistricting . . . that the Legislature had Article III standing." *Id*., citing *Arizona State Legislature*, __ US at __; 135 S Ct 2665-2666.

The injury claimed in this case is that EO 2020-67 and EO 2020-68 nullified the decision of the Legislature to not extend the state of emergency or disaster. The Legislature claims this right is exclusively theirs as an institution under the EMA and this state's Constitution. Understanding that *Lansing Schs Ed Ass'n* specifically departed from the Article III analysis of its predecessor cases, the nullification argument is nevertheless not incompatible with the *Lansing Schs Ed Ass'n* focus on "special injury." This type of injury sounds similar in the nature of the right that was taken from the one plaintiff who had standing in *Dodak*, 441 Mich at 559-560, i.e., the member of the House Appropriations Committee who lost his right to approve or disapprove transfers following the Governor's actions.

In this respect the instant matter is distinguishable from *League of Women's Voters*, __ Mich App at __, slip op at 9, where the Court of Appeals remarked that "the validity of any particular legislative member's vote is not at issue[.]" Plaintiffs have at least a credible argument that they are not merely seeking to have this Court resolve a lost political battle, nor are plaintiffs only generally alleging that the law is not being followed. Cf. *id.* at 8. Rather, they are alleging that the Governor eschewed the Legislature's role under the EMA and nullified an act of the legislative body as a whole. This is an injury that is unique to the Legislature and it shows a

substantial interest that was (allegedly) detrimentally affected in a manner different than the citizenry at large. Cf. *id*. at 7 (discussing standing, generally).

As a final argument on standing, the Governor contends that the Legislature does not need declaratory relief to guide its future actions. She and at least one amicus brief note that the Legislature has in fact moved toward amending the EPGA. At oral argument the Legislature was almost invited to amend either the EMA or EPGA. However, while the legislative body is well aware of its power to enact, amend, and repeal statutes, this Court believes that guidance as to the issues presented in this case will avoid a multiplicity of litigation. The parties here have pled facts of an adverse interest which necessitate the sharpening of the issues raised.

ANALYSIS OF AUTHORITIES CITED IN THE CHALLENGED EXECUTIVE ORDERS

The Executive Orders at issue cite three sources of authority: the EMA, the EPGA, and Const 1963, art 5, § 1. The Court will examine each to determine whether the Governor possessed authority to issue the challenged orders.

ARTICLE 5 OF THE MICHIGAN CONSTITUTION

The challenged orders in this case all contain a brief citation to art 5, § 1. This section of the Michigan Constitution vests "executive power" in the Governor. See Const 1963, art 5, § 1. The Governor invokes this power in claiming authority to issue the challenged Executive Orders. The Legislature has argued that Governor errs in relying on her art 5, § 1 "executive power" to issue orders in response to the pandemic. This court agrees that "Executive power" is merely the "authority exercised by that department of government which is charged with the administration or execution of the laws." *People v Salsbury*, 134 Mich 537, 545; 96 NW 936 (1903). In fact, the

Governor has not claimed in her briefing or at oral argument that she had the authority to enact EO 2020-67 or EO 2020-68 absent an enabling statute. Through two distinct acts, stated in plain and certain terms, the Legislature has granted the Governor broad but focused authority to respond to emergencies that affect the State and its people. The Governor's challenged actions—declaring states of disaster and emergency during a worldwide public health crisis—are required by the very statutes the Legislature drafted. Thus, the focus of this opinion, is on those two distinct acts, the EMA and EPGA.

THE EPGA AUTHORIZED EO 2020-67 AND SUBSEQUENT ORDERS RELIANT THEREON

The Court will first turn its attention to the EPGA and to plaintiffs' arguments that the EPGA did not permit the Governor to issue a statewide emergency declaration in EO 2020-67 or any subsequent orders reliant on EO 2020-67. Plaintiffs advance two arguments in support of their position: (1) first, they contend that the EPGA, unlike the EMA, does not grant authority for a *statewide* declaration of emergency, but instead only confers upon the Governor the authority to issue a local or regional state of emergency; (2) second, plaintiffs argue that if the EPGA does grant authority for a statewide state of emergency, the delegation of legislative authority accomplished by the act is unconstitutional. The Court rejects both of plaintiffs' contentions regarding the EPGA and concludes that EO 2020-67, and any orders relying thereon, remain valid.

Turning first to the scope of the EPGA, the Court notes that the statute bestows broad authority on the Governor to declare a state of emergency and to take necessary action in connection with that declaration. See MCL 10.31(1). Under the EPGA, the Governor "may promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." *Id.*

The Legislature stated that its intent in enacting MCL 10.32 was to "to invest the governor with sufficiently broad power of action in the exercise of the police power of the state to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster." Section 2 of the EPGA continues, declaring that the provisions of the EPGA "shall be broadly construed to effectuate this purpose." *Id.*

Reading the EPGA as a whole, as this Court must do, see *McCahan v Brennan*, 492 Mich 730, 738-739; 822 NW2d 747 (2012), the Court rejects plaintiffs' attempt to limit the scope of the EPGA to local or regional emergencies only. Informing this decision is the statement of legislative intent in MCL 10.32, which declares that the EPGA was intended to confer "sufficiently broad power" on the Governor in order to enable her to respond to public disaster or crisis. It would be inconsistent with this intent to find that "sufficiently broad power" to respond to matters of great public crisis is constrained by contrived geographic limitations, as plaintiffs suggest. The Court also notes that this "sufficiently broad" power granted by the Legislature references "the police power of the state[.]" MCL 10.32. In general, the police power of the state refers to the state's inherent power to "enact regulations to promote the public health, safety, and welfare" of the citizenry at large. See *Blue Cross & Blue Shield of Mich v Milliken*, 422 Mich 1, 73; 367 NW2d 1 (1985). It cannot be overlooked that the police power of the state, which undeniably pertains to the state as a whole, see, e.g., *Western Mich Univ Bd of Control v State*, 455 Mich 531, 536; 565 NW2d 828 (1997), was given to a state official, the Governor, who possesses the executive power of the entire state. See Const 1963, art 5, § 1. Plaintiffs' attempts to read localized restrictions on broad, statewide authority given to this state's highest executive official are unconvincing.

The Act has a much broader application than plaintiffs suggest. The Act repeatedly uses terms such as "great public crisis," "public emergency," "public crisis," "public disaster," and

"public safety" when referring to the types of events that can give rise to an emergency declaration. See MCL 10.31(1); MCL 10.32. These are not terms that suggest local or regional-only authority. See *Black's Law Dictionary* (11th ed) (defining public safety). See also *Merriam-Webster Online Dictionary*, <https://www.merriam-webster.com/dictionary/public> (accessed May 11, 2020) (defining "public" to mean "of, relating to, or affecting *all the people of the whole area of a nation or state*") (emphasis added). Taking these broad terms and imposing limits on them as plaintiffs suggest would run contrary to MCL 10.32's directive to broadly construe the authority granted to the Governor under the EPGA. See *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (explaining that it is "well established that to discern the Legislature's intent, statutory provisions are *not* to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."). And in this context, it is apparent the EPGA employs broad terminology that empowers the Governor to act for the best interests of all the citizens of this state, not just the citizens of a particular county or region. It would take a particularly strained reading of the plain text of the EPGA to conclude that a grant of authority to deal with a public crisis that affects all the people of this state would somehow be constrained to a certain locality. Moreover, adopting plaintiffs' view would require the insertion into the EPGA of artificial barriers on the Governor's authority to act which are not apparent from the text's plain language. To that end, even plaintiffs would surely not quibble that the broad authority bestowed on the Governor under the act would permit her to respond to an emergency situation that affected one county, or perhaps even multiple counties. Under plaintiffs' view, if that emergency became too large and it affected the entire state, the Governor would have to pick and choose which citizens could be assisted by the powers granted by the EPGA because, according to plaintiffs, rendering emergency assistance to the state's entire citizenry is not an option under the EPGA. While plaintiffs generally contend there

are localized or regionalized limitations on the Governor's authority under the EPGA, they do not explain how to demarcate the precise geographic limitations on the Governor's authority under the EPGA—and this is for good reason: there are no such limitations.

In arguing for a contrary interpretation of the scope of the Governor's authority under the EPGA, plaintiffs selectively rely on parts of the statute and ignore the contextual whole. For instance, they focus on the notion that a city or county official may apply for an emergency declaration in order to support their assertion that the EPGA only applies to local or regional emergency declarations. In doing so, plaintiffs ignore that the same sentence permitting local officials to apply for an emergency declaration also authorizes two state officials—one of whom is the Governor herself—to apply for or make an emergency declaration. See MCL 10.31(1). Equally unpersuasive is plaintiffs' fixation on the word "within" as it appears in MCL 10.31(1). Plaintiffs note that MCL 10.31(1) permits the Governor to declare a state of emergency in response to "great public crisis, disaster, rioting, catastrophe, or similar public emergency *within the state*" (emphasis added). According to plaintiffs, the use of the word "within" means that an emergency can only be declared at a particular location *within* the state, and precludes the state of emergency from being declared for the entire state. However, a common understanding of the word "within," including the same definition plaintiffs cite, demonstrates the flaw in plaintiffs' position. The word "within" is generally used "as a function word to indicate enclosure or containment." *Merriam-Webster's Online Dictionary*, <https://www.merriam-webster.com/dictionary/within> (accessed May 20, 2020). For instance, it can refer to "the scope or sphere of" something, such as referring to that which is "within the jurisdiction of the state." *Id.* In other words, the term "within" refers to the jurisdictional bounds of the state. The authority to declare an emergency "within" the state is, quite simply, the authority to declare an emergency across the entire state.

Plaintiffs next argue that, when the EPGA is read together with the EMA, it is apparent that the EPGA is not meant to address matters of statewide concern. In general, both the EPGA and the EMA grant the Governor power to act during times of emergency. "Statutory provisions that relate to the same subject are *in pari materia* and should be construed harmoniously to avoid conflict." *Kazor v Dep't of Licensing & Regulatory Affairs*, 327 Mich App 420, 427; 934 NW2d 54 (2019). "The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. If statutes lend themselves to a construction that avoids conflict, that construction should control." *In re AGD*, 327 Mich App 332, 344; 933 NW2d 751 (2019) (citation and quotation marks omitted).

Here, when the EMA and the EPGA are read together, it is apparent that there is no conflict between the two acts even though they address similar subjects. While plaintiffs are correct in their assertion that the EMA contains more sophisticated management tools, that does not mean that the EPGA is limited to local and regional emergencies only. Nor does the fact that both statues apply to statewide emergencies mean that one act renders the other nugatory. Instead, the Court can harmonize the two statutes, see *In re AGD*, 327 Mich App at 344, by recognizing that while both statutes permit the Governor to declare an emergency, the EMA equips the Governor with more sophisticated tools and options at her disposal. The use of these enhanced features comes at some cost, however, because the EMA is subject to the 28-day time limit contained in MCL 30.405(3)-(4), whereas an emergency declaration under the less sophisticated EPGA has no end date. Finally, plaintiffs' contentions regarding a conflict between the EMA and the EPGA are belied by MCL 30.417. That section of the EMA expressly states that nothing in the EMA was intended to "Limit, modify, or abridge the authority of the governor to proclaim a state of emergency pursuant to Act No. 302 of the Public Acts of 1945, being sections 10.31 to 10.33 of

the Michigan Compiled Laws . . . ." MCL 30.417(d). In other words, the EMA explicitly recognizes the EPGA and it recognizes that the Governor possesses similar, but different, authority under the EPGA than she does under the EMA.

Plaintiffs' final attempt to assert that the EPGA was intended as a local or regional act is to point to what they describe as the history of the EPGA. In general, the legislative history of an act and the historical context of a statute can be considered by a court in ascertaining legislative intent; however, these sources are generally considered to have little persuasive value. See, e.g., *In re AGD*, 327 Mich App 342 (generally rejecting legislative history as "a feeble indicator of legislative intent and . . . therefore a generally unpersuasive tool of statutory construction") (citation and quotation marks omitted). Here, the history cited by plaintiffs is particularly unpersuasive because, having reviewed the same, the Court concludes that it does not even address or suggest the local limit plaintiffs attempt to impose on the EPGA. Nor have plaintiffs directed the Court's attention to a particular piece of history that expressly supports their claim; they instead rely on mere generalities and anecdotal commentary. Finally, the EPGA presents no ambiguity requiring explanation through extrinsic historical commentary.

In an alternative argument, plaintiffs argue that, assuming the Governor's ability to act under the EPGA gives her statewide authority, the executive orders issued pursuant to the EPGA are nevertheless invalid. According to plaintiffs, the Governor's exercise of lawmaking authority under the orders runs afoul of separation of powers principles.

Plaintiffs' constitutional challenge to the EPGA fares no better than their attempt to limit the Act's scope. This Court must, when weighing this constitutional challenge to the EPGA, remain mindful that a statute must be presumed constitutional, "unless its constitutionality is

readily apparent." *Mayor of Detroit v Arms Tech, Inc*, 258 Mich App 48, 59; 669 NW2d 845 (2003) (citation and quotation marks omitted). Indeed, "[t]he power to declare a law unconstitutional should be exercised with extreme caution and never where serious doubt exists with regard to the conflict." *Council of Orgs & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 570; 566 NW2d 208 (1997).

Const 1963, art 3, § 2 declares that "[t]he powers of government are divided into three branches: legislative, executive and judicial." The Constitution dictates that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." *Id*. The issue in this case concerns what plaintiffs have alleged is an unconstitutional delegation of legislative power to the Governor. While the Legislature cannot delegate its legislative power to the executive branch of government, the prohibition against delegation does not prevent the Legislature "from obtaining the assistance of the coordinate branches." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003) (citation and quotation marks omitted). As explained by our Supreme Court, "[c]hallenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power." *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 51; 367 NW2d 1 (1985).

In general, the Supreme Court has recognized three "guiding principles" to be applied in non-delegation cases:

> First, the act in question must be read as a whole; the provision in question should not be isolated but must be construed with reference to the entire act. Second, the standard should be as reasonably precise as the subject matter requires or permits. The preciseness of the standard will vary with the complexity and/or the degree to which subject regulated will require constantly changing regulation. The various and varying detail associated with managing the natural resources has led to

> recognition by the courts that it is impractical for the Legislature to provide specific regulations and that this function must be performed by the designated administrative officials. Third, if possible the statute must be construed in such a way as to render it valid, not invalid, as conferring administrative, not legislative power and as vesting discretionary, not arbitrary, authority. [*State Conservation Dep't v Seaman*, 396 Mich 299, 309; 240 NW2d 206 (1976) (internal citations and quotation marks omitted).]

Any discussion of plaintiffs' non-delegation issue must acknowledge that the policy goals and the complexity of issues presented under the EPGA do not concern ordinary, everyday issues. Rather, as the title of the act and its various provisions reflect, the EPGA is only invoked in times of emergency and of "great public crisis," and when "public safety is imperiled[.]" MCL 10.31(1). Hence, while the Governor's powers are not expanded by crisis, the standard by which this Court must view the standards ascribed to the delegation at issue must be informed by the complexities inherent in an emergency situation. *Blue Cross & Blue Shield*, 422 Mich at 51; *State Conservation Dep't*, 396 Mich at 309.

With that backdrop, and when viewing the EPGA in its entirety, the Court concludes that the Act contains sufficient standards and that it is not an unconstitutional delegation of legislative authority. At the outset, MCL 10.31(1) provides parameters for when an emergency declaration can be made in the first instance. The power to declare an emergency only arises during "times of great public crisis, disaster, rioting, catastrophe, or similar public emergency within the state, or reasonable apprehension of immediate danger of a public emergency of that kind, when public safety is imperiled . . . ." *Id*. In addition, the statute provides a process for other officials, aside from the Governor, to request or aid in assessing whether an emergency should be declared. See *id*. (allowing input from "the mayor of a city, sheriff of a county, or the commissioner of the Michigan state police"). Therefore, the EPGA places parameters and limitations on the Governor's power to declare a state of emergency in the first instance, which weighs against plaintiffs'

position. Cf. *Blue Cross & Blue Shield*, 422 Mich at 52-53 (finding an unconstitutional delegation of legislative authority where there were no guidelines provided to direct the pertinent official's response and where the power of the official was "completely open-ended.").

Furthermore, the EPGA provides standards on what a Governor can, and cannot, do after making an emergency declaration. As for what she can do, the Governor may "promulgate *reasonable* orders, rules, and regulations as he or she considers *necessary to protect life and property or to bring the emergency situation within the affected area under control*." MCL 10.31(1) (emphasis added). The Legislature's use of the terms "reasonable" and "necessary" are not trivial expressions that can be cast aside as easily as plaintiffs would have the Court do. Rather than being mere abstract concepts that fail to provide a meaningful standard, the terms "reasonable" and "necessary" have historically proven to provide standards that are more than amenable to judicial review. See, e.g., MCL 500.3107(1)(a) (describing, in the context of personal injury protection insurance, "allowable expenses" that consist of "reasonable" charges incurred for "reasonably necessary products, services and accommodations . . . ."). Thus, the Court rejects any contention that these terms are too ambiguous to provide meaningful standards. See *Klammer v Dep't of Transp*, 141 Mich App 253, 262; 367 NW2d 78 (1985) (concluding that a delegation of authority which permitted an administrative body to continue to employ an individual for such a period of time as was "necessary" provided a sufficient standard, under the circumstances). See also *Blank v Dept' of Corrections*, 462 Mich 103, 126; 611 NW2d 530 (2000) (opinion by Kelly, J.) (finding a constitutionally permissible delegation of authority, in part, based on the enabling legislation constrained rulemaking authority to only those matters that were "necessary for the proper administration of this act."). Finally, in addition to the above standards, the EPGA goes on to expressly list examples of that which a Governor can and cannot do under the EPGA. See MCL

10.31(1) (providing a non-exhaustive, affirmative list of subjects on which an order may be issued); MCL 10.31(3) (containing an express prohibition on orders affecting lawfully possessed firearms). Accordingly, the EPGA contains some restrictions on the Governor's authority and it provides standards for the exercise of authority under the Act.[3]

In sum, the Court concludes that plaintiffs' challenges to the Governor's authority to declare a state of emergency under the EPGA and to issue Executive Orders in response to a statewide emergency situation under the EPGA are meritless. Thus, and for the avoidance of doubt, while the Court concludes that the Governor's actions under the EMA were unwarranted—see discussion below—the Court concludes that plaintiffs have failed to establish a reason to invalidate Executive Orders that rely on the EPGA.

EXECUTIVE ORDER 2020-68 WAS NOT AUTHORIZED BY THE EMA

Turning next to the Governor's orders issued pursuant to the EMA, the Court again notes that the legitimacy of the initial declaration of emergency and disaster, Executive Order No. 2020-04, is unchallenged in this case. The extension of that declaration under EO 2020-33 is likewise agreed to be a legitimate exercise of gubernatorial power. This court is not asked to review the scope of myriad emergency measures authorized under either declaration. The laser focus of this case is the legitimacy of EO 2020-68, which re-declared a state of emergency and state of disaster under the EMA only one minute after EO 2020-66 cancelled the same. The Legislature contends that the issuance of EO 2020-68 was ultra vires, and this Court agrees.

[3] The Court notes that Judge Kelly reached a similar conclusion, albeit in the context of denying a motion for preliminary injunction, in the case of *Mich United for Liberty v Whitmer*, Docket No. 20-000061-MZ.

The EMA allows circumvention of the traditional legislative process only under extraordinary circumstances and for a finite period of time. Enacted in 1976, the EMA grants the Governor sweeping powers to cope with "dangers to this state or the people of this state presented by a disaster or emergency." MCL 30.403(1). These powers include the authority to issue executive orders and directives that have the force and effect of law. MCL 30.403(2). The Governor may also, by executive order, "Suspend a regulatory statute, order, or rule prescribing the procedures for conduct of state business, when strict compliance with the statute, order, or rule would prevent, hinder, or delay necessary action in coping with the disaster or emergency." MCL 30.405(1)(a). Additionally, the Governor may issue orders regarding the utilization of resources; may transfer functions of state government; may seize private property—with the payment of "appropriate compensation"—evacuate certain areas; control ingress and egress; and take "all other actions which are which are necessary and appropriate under the circumstances." See, e.g., MCL 30.405(1)(b)-(j). This power is indeed awesome.

The question presented is whether the Governor could legally, by way of Executive Order 2020-68, declare the exact states of emergency and disaster that she had, only one minute before, terminated. The Legislature answer with an emphatic, "No," and the Governor offers an equally emphatic, "Yes."

As with most contracts, the Legislature asserts that time is of the essence in the limits of the extraordinary power afforded the executive under the EMA. The Act is replete with references to timing. MCL 30.403 provides as follows:

> The state of disaster shall continue until the governor finds that the threat or danger has passed, the disaster has been dealt with to the extent that disaster conditions no longer exist, or until the declared state of disaster has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation*

> *declaring the state of disaster terminated, unless a request by the governor for an extension of the state of disaster for a specific number of days is approved by resolution of both houses of the legislature*. An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the disaster, the area or areas threatened, the conditions causing the disaster, and the conditions permitting the termination of the state of disaster. [MCL 30.403(3) (emphasis added).]

Later the act addresses the duration of a "state of emergency," and its extension under MCL 30.403(4):

> The state of emergency shall continue until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days. *After 28 days, the governor shall issue an executive order or proclamation declaring the state of emergency terminated, unless a request by the governor for an extension of the state of emergency for a specific number of days is approved by resolution of both houses of the legislature.* An executive order or proclamation issued pursuant to this subsection shall indicate the nature of the emergency, the area or areas threatened, the conditions causing the emergency, and the conditions permitting the termination of the state of emergency. [Emphasis added.]

The limitation of 28 days is repeated multiple times. A state of emergency or disaster, once declared, terminates no later than 28 days after being initially declared. The Governor can determine that the emergent conditions have been resolved earlier than 28 days. Alternatively, the Governor may ask the Legislature to extend the emergency powers for a period of up to 28 days from the issuance of the extension. Nothing in Act precludes legislative extension for multiple additional 28-day periods. In this case the Governor stated in EO 2020-66 that she expressly terminated the previously issued states of emergency and disaster—not because the disaster or emergency condition ceased to exist—but because a period of 28 days had expired. In fact, EO 2020-66, the order that terminated the states of disaster and emergency under the EMA, expressly acknowledged that the emergency and/or disaster had not subsided and still remained In this respect, EO 2020-66 complied with MCL 30.403(3) and (4)'s directives that the Governor "shall,"

after 28 days, "issue an executive order or proclamation declaring" that the state of emergency and/or disaster terminated.

However, the Governor argues that she may continue to exercise emergency powers under the EMA without legislative authorization in this case. She argues that she has a duty and the authority to do so because the Legislature failed to grant her the requested extension despite the fact that the emergent conditions continued to exist.

Neither party to this case denies that the COVID-19 emergency was abated as of April 30. No serious argument has been offered that had the Governor not issued EO 2020-68 that all of the emergency measures authorized by EO-33 would have terminated with the signing of EO 2020-66 on April 30 even if had the governor not vetoed SB 858, which purported to embody several of the expiring Executive Orders and which would not have been effective until 90 days later because the Legislature did not give that bill immediate effect. The Governor asserts she had a duty to act to address the void. She argues that MCL 30.403(3) and (4) compelled her, upon the termination of the states of emergency and disaster accomplished by way of time, to declare anew both states of emergency and disaster within minutes. The Governor makes this argument by emphasizing language in MCL 30.403(3) and (4) stating that, if the Governor finds that a disaster or emergency occurs, then she "shall" issue orders declaring states of emergency or disaster. Thus, argues the Governor, when the 28-day emergency and disaster declarations ended, but the disaster and emergency conditions remained, the Governor was compelled, irrespective of legislative approval, to re-declare states of emergency and disaster.

The EMA does not prohibit a governor from declaring multiple emergencies or disasters during a term of office or even more than on disaster at the same time. Indeed, the collapse of the

dam at the Tittabawassee River sparked the issuance of a separate state of emergency and disaster during of this lawsuit. Clearly the collapse of the dam and the subsequent flooding was a new and different circumstance from the COVID-19 pandemic. Returning to the instant case, it could also be argued that the very fact that the Legislature had neither authorized the extension of the emergency powers of the Governor under the EMA nor put in place measures to address the emergent situation was itself a new emergency justifying gubernatorial action. However, the "new" circumstance was occasioned not by a mutation of the disease into something such as "COVID-20," a precipitous spike in infection, or any other factor, except the Legislature's failure to grant an extension.

Thus, while the Governor emphasizes the directive that she "shall" declares states of emergency and disaster, the Court concludes that the Governor takes these directives out of context and renders meaningless the legislative extension set forth in MCL 30.403(3) and (4). The Governor's position ignores the other crucial "shall" in the statute. "After 28 days, the governor *shall* issue an executive order or proclamation declaring the state of" disaster or emergency terminated, "*unless a request by the governor for an extension of the state of*" *disaster or emergency* "*for a specific number of days is approved by resolution of both houses of the legislature*." See MCL 30.403(3) (as to disasters); MCL 30.403(4) (as to emergencies). The language employed here is mandatory: The Governor "*shall*" terminate the state of emergency or disaster *unless* the Legislature grants a request to extend it. See *Smitter v Thornapple Twp.*, 494 Mich 121, 136; 833 NW2d 785 (2013) (explaining that the term "shall" denotes a mandatory directive). Stated otherwise, at the end of 28 days, the EMA contemplates only two outcomes: (1) the state of emergency and/or disaster is terminated by order of the Governor; or (2) the state of emergency/disaster continues *with legislative approval*. The only qualifier on the "shall terminate"

language is an affirmative grant of an extension from the Legislature. There is no third option for the Governor to continue the state of emergency and/or disaster on her own, absent legislative approval. Nor does the statute permit the Governor to simply extend the same state of disaster and/or emergency that was otherwise due to expire. To adopt the Governor's interpretation of the statute would render nugatory the express 28-day limit and it would require the Court to ignore the plain statutory language. Whatever the merits of that might be as a matter of policy, that position conflicts with the plain statutory language. The Governor's attempt to read MCL 30.403(2) as providing an additional, independent source of authority to issue sweeping orders would essentially render meaningless MCL 30.405(1)'s directive that such orders only issue upon an emergency declaration. It would also read into MCL 30.403(2) broad authority not expressed in the subsection's plain language. See *Robinson*, 486 Mich at 21 (explaining that, when it interprets a statute, a reviewing court must "avoid a construction that would render part of the statute surplusage or nugatory") (citation and quotation marks omitted). See also *United States Fidelity & Guarantee Co v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 13; 795 NW2d 101 (2009) ("As far as possible, effect should be given to every phrase, clause, and word in the statute."). The Court is not free to "pick and choose what parts of a statute to enforce," see *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 143; 892 NW2d 33 (2016), yet that is precisely what the Governor's position has asked the Court to do. The language of MCL 30.403(3) and (4) requiring legislative approval of an emergency or disaster declaration should not so easily be cast aside.

Finally, and contrary to the Governor's argument, the 28-day limit in the EMA does not amount to an impermissible legislative veto. See *Blank v Dept' of Corrections*, 462 Mich 103, 113-114; 611 NW2d 530 (2000) (opinion by KELLY, J.) (declaring that, once the Legislature delegates authority, it does not have the right to retain veto authority over the actions of the

executive). The Governor's characterization of the 28-day limit as a legislative veto is not accurate. The 28-day limit is not legislative oversight or a "veto" of the Governor's emergency declaration; rather, it is a standard imposed on the authority so delegated. That is, the Governor is afforded with broad authority under the EMA to make rules and to issue orders; however, that authority is subject to a time limit imposed by the Legislature. The Legislature has not "vetoed" or negated any action by the executive branch by imposing a temporal limit on the Governor's authority; instead, it limited the amount of time the Governor can act independently of the Legislature in response to a particular emergent matter.

CONCLUSION

IT IS HEREBY ORDERED that the relief requested in plaintiffs' motion for immediate declaratory judgment is DENIED. While the Governor's action of re-declaring the same emergency violated the provisions of the EMA, plaintiffs' challenges to the EPGA and the Governor's authority to issue Executive Orders thereunder are meritless.

This order resolves the last pending claim and closes the case.

Dated: May 21, 2020

Cynthia Diane Stephens, Judge
Court of Claims

2020 WL 3468281
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

LEAGUE OF INDEPENDENT FITNESS
FACILITIES AND TRAINERS,
INC., et al., Plaintiffs-Appellees,
v.
Governor Gretchen WHITMER,
et al., Defendants-Appellants.

No. 20-1581
|
FILED June 24, 2020

Synopsis

Background: Companies which owned and operated indoor fitness facilities brought an action against state governor challenging executive order which closed indoor fitness facilities in response to COVID-19 pandemic. The United States District Court for the Western District of Michigan, Paul L. Maloney, J., 2020 WL 3421229, granted plaintiffs' motion for preliminary injunction, and thereafter, 2020 WL 3422586, denied governor's motion for a stay of the injunction pending appeal. Governor moved for an emergency stay of preliminary injunction.

Holdings: The Court of Appeals held that:

executive order was rationally related to governmental interest in protecting safety of citizens and combating spread of COVID-19, and

emergency stay of enforcement of preliminary injunction was warranted.

Motion granted.

Attorneys and Law Firms

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Before: GIBBONS, COOK, and READLER, Circuit Judges.

ORDER

***1** In addressing the COVID-19 outbreak, executives at the national, state, and local levels have had difficult decisions to make in honoring public health concerns while respecting individual liberties. Those decisions have now been the subject of numerous legal challenges, from coast to coast. Some involve individual rights for which precedent requires courts to apply a heightened level of scrutiny to government actions, for example, the free exercise of religion, *see Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614–15 (6th Cir. 2020), or access to an abortion, *see Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 925–26 (6th Cir. 2020). But many other cases involve executive actions that, by precedent, are viewed only through the lens of a very modest, or "rational basis," standard of review. And almost without exception, courts in those instances have appropriately deferred to the judgments of the executive in question. *See, e.g.*, *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020); *McCarthy v. Cuomo*, No. 20-cv-2124 (ARR), 2020 WL 3286530, at *6 (E.D.N.Y. June 18, 2020); *Cassell v. Snyders*, —— F. Supp. 3d ——, ——, 2020 WL 2112374, at *11 (N.D. Ill. May 3, 2020).

Today's case similarly fits that deferential mold. As this case comes to the Court in the posture of a request for an emergency stay, residents of the State of Michigan have been subject to a wave of executive orders governing their rights and responsibilities since the onset of the COVID-19 crisis. Governor Gretchen Whitmer has taken an "incremental approach" to reopening sectors of the economy closed in response to COVID-19. Governor's Motion at 7. While many states have allowed their residents to resume most traditional day-to-day activities, Michiganders do not yet enjoy those

same privileges, in full. And so it is perhaps somewhat understandable that those restrictions have generated various legal challenges, including this one.

Plaintiffs here are mostly owners and operators of Michigan indoor fitness facilities closed in all but the northernmost parts of the state by order of Governor Whitmer. *See* § 12(b) Mich. Exec. Order No. 2020-110. Plaintiffs challenge that Order on the grounds that it violated, among other constitutional protections, the Fourteenth Amendment's guarantee of equal protection of the laws by treating indoor fitness facilities (which remain completely closed) differently from bars, restaurants, and salons (which may open with restrictions). Finding that the Order did not involve a fundamental right or suspect classification, the district court concluded that rational-basis review applied. Nevertheless, it found that the Order's differential treatment of indoor fitness facilities failed even that deferential test and issued a preliminary injunction. The Governor unsuccessfully moved the district court for a stay pending appeal. She now moves this Court for an emergency stay.

Our jurisdiction over the district court's order granting a preliminary injunction is well-established. 28 U.S.C. § 1292(a)(1). We review four factors when evaluating whether to grant an injunction or stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). First among equals are factors one and two, which we typically treat as "the most critical." *Id.*; *see Ohio State Conference of NAACP v. Husted*, 769 F.3d 385, 387 (6th Cir. 2014). More broadly, "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 918 (6th Cir. 2018). As the moving party, the Governor bears the burden of showing a stay is warranted. *Id.* She has met that burden.

***2** We first consider the likelihood that the district court's grant of a preliminary injunction will be reversed on appeal. All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts. *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 49 L.Ed. 643 (1905). This century-old historical principle has been reaffirmed just this year by a chorus of judicial voices, including our own. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020); *In re Rutledge*, 956 F.3d 1018, 1031–32 (8th Cir. 2020); *In re Abbott*, 956 F.3d 696, 704–05 (5th Cir. 2020); *Geller v. de Blasio*, —— F. Supp. 3d ——, ——, 2020 WL 2520711, at *3 (S.D.N.Y. May 18, 2020); *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *3 (D. Ariz. May 8, 2020); *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, —— F. Supp. 3d ——, ——, 2020 WL 2307224, at *3 (E.D. Cal. May 8, 2020). The police power, however, is not absolute. "While the law may take periodic naps during a pandemic, we will not let it sleep through one." *Maryville Baptist Church*, 957 F.3d at 615.

The parties agree that rational basis review is the hurdle the Governor's Order must clear. Utilizing that legal framework, we presume the Order is constitutional, making it incumbent upon Plaintiffs to negate "every conceivable basis which might support" it. *Armour v. City of Indianapolis*, 566 U.S. 673, 681, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012). That is no easy task. Plaintiffs must disprove all possible justifications for the Order regardless whether those justifications actually motivated the Governor's decisionmaking. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of 'legislative facts' explaining the distinction 'on the record' has no significance in rational-basis analysis.") (citations omitted). Under this test, the Governor's action "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315, 113 S.Ct. 2096. Especially so, we note, in the case of a public health crisis like the one presented by COVID-19, where "[Michigan's] latitude must be especially broad." *South Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 140 S. Ct. 1613, 1613, —— L.Ed.2d —— (2020) (Mem.) (Roberts, C.J., concurring in the denial of injunctive relief) (citing *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974)).

The district court granted the injunction primarily because the Governor did not adequately explain during the hearing below her somewhat unique treatment of indoor fitness facilities,

relying instead on conclusory statements that gyms are "dangerous." While perhaps a fair critique of the statements made during the hearing, that observation to overlooks rationales offered by the Governor in her briefing. Governor's Dist. Ct. Br. at 28 (describing indoor fitness facilities as presenting a "combination of heightened risks of infection and spread" of COVID-19). More to the point, unlike exacting forms of scrutiny applied in other contexts, the Governor was not required to explain that choice at all, let alone exhaustively. *Beach Commc'ns*, 508 U.S. at 313–14, 113 S.Ct. 2096. Rather, the relevant standard merely requires "rational speculation" that offers "conceivable" support to the Governor's order. *Id.* at 315, 113 S.Ct. 2096.

***3** Against the backdrop of that low bar, the Governor justifies her order as follows, citing a CDC Research Paper for support:

> [E]ven the most ventilated indoor facility is susceptible to respiratory spread of the virus. The danger is only amplified when people congregate (even with social distancing) in a confined space and work out. By its nature, working out is sustained vigorous physical activity, which necessarily means heavy breathing and sweating and, therefore, acute, propulsive bursts of virus shedding by anyone in that confined space who might be infected. Apart from individual exercisers in proximity, there is the added risk of individuals working out together or organized groups working out for extended trainer-led sessions. And the risk of viral spread is only heightened further by the sharing of exercise equipment among many different people over the course of the day, even when good-faith efforts are made to clean that equipment after each use.
>
> At a fitness center, these factors merge to significantly increase the incidence of this highly contagious and asymptomatically transmittable virus spreading.

Governor's Dist. Ct. Br. at 20 (footnote omitted). The idea that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus is a paradigmatic example of "rational speculation" that fairly supports the Governor's treatment of indoor fitness facilities. Presumably for these same reasons, some similar establishments, such as dance halls and rock-climbing facilities, are also closed pursuant to the Order. Whether the Governor's Order is "unsupported by evidence or empirical data" in the record does not undermine her decision, at least as a legal matter. *Beach Commc'ns*, 508 U.S. at 315, 113 S.Ct. 2096. After all, we must "accept [the Governor's] generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

The district court understandably expressed frustration at the justifications underlying these executive actions. Dist. Ct. Op. at 13 ("This Court fully recognizes that the bar is extremely low, but it is not that low. Defendants cannot rely on the categorization of gyms as 'dangerous,' without a single supporting fact, to uphold their continued closure."). Among other uncertainties of the decisionmaking process, the Order does not close every venue in which the virus might easily spread. Yet the Governor's order need not be the most effective or least restrictive measure possible to attempt to stem the spread of COVID-19. *Heller*, 509 U.S. at 321, 113 S.Ct. 2637. Shaping the precise contours of public health measures entails some difficult line-drawing. Our Constitution wisely leaves that task to officials directly accountable to the people. *South Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (citing *Jacobson*, 197 U.S. at 38, 25 S.Ct. 358) (observing that where the "broad limits" of rational basis review "are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people"). Even if imperfect, the Governor's Order passes muster under the rational basis test. *Williamson v. Lee Optical*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others.").

***4** The remaining three stay factors follow quickly in tow. Start with harm. Enjoining the actions of elected state officials, especially in a situation where an infectious disease can and has spread rapidly, causes irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 1301, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012). Effects on interested parties and the public interest are closely related. Though Plaintiffs bear the very real risk of losing their businesses, the Governor's interest in combatting COVID-19 is at least equally significant. To date, the disease has infected thousands of Michiganders, and it has shown the potential to infect many more. That the public interest weighs in favor of a stay is apparent for the same reason.

* * * * *

We sympathize deeply with the business owners and their patrons affected by the Governor's Order. Crises like

COVID-19 can call for quick, decisive measures to save lives. Yet those measures can have extreme costs—costs that often are not borne evenly. The decision to impose those costs rests with the political branches of government, in this case, Governor Whitmer. Her motion for an emergency stay is thus **GRANTED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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Supreme Court of Pennsylvania.

The Honorable Tom WOLF, Governor of the Commonwealth of Pennsylvania, Petitioner
v.
Senator Joseph B. SCARNATI, III, Senator Jake Corman, and Senate Republican Caucus, Respondents

No. 104 MM 2020
|
Submitted: July 1, 2020
|
Decided: July 1, 2020

Synopsis

Background: State Senate President Pro Tempore, Senate Majority Leader, and Senate Republican Caucus, brought complaint in the Commonwealth Court in mandamus, seeking to enforce a concurrent resolution ordering the Governor to terminate COVID-19 disaster emergency. Subsequently, the Governor filed an application for the Supreme Court to grant extraordinary relief and declare the resolution null and void under the Declaratory Judgments Act, to which Senators moved to intervene.

Holdings: The Supreme Court, No. 104 MM 2020104 MM 2020, Wecht, J., held that:

resolution required presentment to the Governor for approval or veto;

concurrent resolution provision of statute governing the general authority of the Governor, which provided that the General Assembly could, by concurrent resolution terminate a state of disaster emergency at any time, required an additional step, did not operate to allow the legislature to issue resolution ordering termination of disaster emergency without presentment to the Governor for approval or veto;

Constitutional provision that provided that "no power of suspending laws shall be exercised unless by the Legislature or by its authority" did not operate to allow the Legislature to act unilaterally to end the Governor's state of emergency with regard to the COVID-19 pandemic through a concurrent resolution; and

even if Governor's action in issuing executive order amounted to a power to suspend laws, it did not violate the separation of powers doctrine and complied with the requirements of the non-delegation doctrine.

Motion granted, and ordered accordingly.

Dougherty, J., filed a concurring and dissenting opinion.

Saylor, Chief Justice, filed concurring and dissenting opinion, joined by Mundy, J.,

344 MD 2020

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE WECHT

***1** Our government's response to the challenges presented by the COVID-19 pandemic has engendered passionate arguments that span the political spectrum. Pennsylvanians have watched with great interest as the political branches of our Commonwealth's government, represented by the Governor and the General Assembly, have debated how best to respond to this novel coronavirus. In light of the intense public interest in this issue, and because "[s]unlight is said to be the best of disinfectants," [1] we find it necessary to make clear what this Court is, and is not, deciding in this case. We express no opinion as to whether the Governor's response to the COVID-19 pandemic constitutes wise or sound policy. Similarly, we do not opine as to whether the General Assembly, in seeking to limit or terminate the Governor's exercise of emergency authority, presents a superior approach for advancing the welfare of our Commonwealth's residents. Instead, we decide here only a narrow legal question: whether the Pennsylvania Constitution and the Emergency Services Management Code permit the General Assembly to terminate the Governor's Proclamation of Disaster Emergency by passing a concurrent resolution, without presenting that resolution to the Governor for his approval or veto.

I. The Governor's Proclamation of Disaster Emergency

On March 6, 2020, in response to the COVID-19 pandemic, Governor Tom Wolf issued a Proclamation of Disaster Emergency ("Proclamation") [2] pursuant to 35 Pa.C.S. § 7301(c), a provision of the Emergency Management Services Code, *id.* §§ 7101, *et seq.* [3] Section 7301(c) states, in full:

> **(c) Declaration of disaster emergency.**--A disaster emergency shall be declared by executive order or proclamation of the Governor upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed by the Governor. *The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency.* All executive orders or proclamations issued under this subsection shall

> indicate the nature of the disaster, the area or areas threatened and the conditions which have brought the disaster about or which make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, shall be promptly filed with the Pennsylvania Emergency Management Agency and the Legislative Reference Bureau for publication under Part II of Title 45 (relating to publication and effectiveness of Commonwealth documents).

***2** 35 Pa.C.S. § 7301(c) (emphasis added). The Governor's Proclamation activated many emergency resources. To give just a few examples, it: transferred funds to the Pennsylvania Emergency Management Agency; suspended provisions of regulatory statutes relating to the operation of businesses, health, education, and transportation; and mobilized the Pennsylvania National Guard.

On March 19, 2020, consistent with his earlier declaration of a disaster emergency, the Governor issued an order closing businesses that were not considered life-sustaining.[4] Four Pennsylvania businesses and one individual challenged the Governor's Order, alleging that it violated the Emergency Management Services Code and various constitutional provisions. On April 13, 2020, in an exercise of our King's Bench jurisdiction, *see* 42 Pa.C.S. § 502, we ruled that the Governor's order complied with both the statute and our Constitutions. *Friends of Danny DeVito v. Wolf*, —— Pa. ——, 227 A.3d 872 (2020).

On June 3, 2020, the Governor renewed the Disaster Emergency Proclamation for an additional ninety days.[5] On June 9, 2020, the Pennsylvania Senate and the Pennsylvania House of Representatives adopted a concurrent resolution ordering the Governor to terminate the disaster emergency. The resolution provides, in relevant part:

> Whereas, pursuant to Section 12 of Article I of the Constitution of Pennsylvania, the power to suspend laws belongs to the legislature; and
>
> Whereas, 35 Pa.C.S. § 7301(c) authorizes the General Assembly by concurrent resolution to terminate a state of disaster emergency at any time; and
>
> Whereas, 35 Pa.C.S. § 7301(c) provides that upon the termination of the declaration by concurrent resolution of the General Assembly, "the Governor shall issue an executive order or proclamation ending the state of disaster emergency";
>
> Therefore be it
>
> Resolved (the Senate concurring) that the General Assembly, in accordance with 35 Pa.C.S. § 7301(c) and its Article I, Section 12 power to suspend laws, hereby terminate[s] the disaster emergency declared on March 6, 2020, as amended and renewed, in response to COVID-19; and be it further
>
> Resolved, that upon adoption of this concurrent resolution by both chambers of the General Assembly, the Secretary of the Senate shall notify the Governor of the General Assembly's action with the directive that the Governor issue an executive order or proclamation ending the state of disaster emergency in accordance with this resolution and 35 Pa.C.S. § 7301(c)[.]

H.R. Con. Res. 836, 2020 Gen. Assemb., Reg. Sess. 2019-20 (Pa. 2020) (capitalization modified).[6] On June 10, 2020, the Secretary of the Senate informed the Governor of the concurrent resolution, writing: "I am notifying you of the General Assembly's action and the directive that you issue an executive order o[r] proclamation ending the state of disaster emergency in accordance with this resolution and 35 Pa.C.S. § 7301(c)."[7]

***3** On June 11, 2020, Senate President Pro Tempore Joseph B. Scarnati, III, Senate Majority Leader Jake Corman, and the Senate Republican Caucus (collectively, the "Senators") filed a Petition for Review in the Nature of a Complaint in Mandamus in the Commonwealth Court, seeking to enforce H.R. 836. *See Scarnati v. Wolf*, 344 MD 2020. One day later, the Governor filed in this Court an Application for the Court to Exercise Jurisdiction Pursuant to Its King's Bench Powers and/or Powers to Grant Extraordinary Relief. On June 17, 2020, we granted King's Bench jurisdiction and stayed the

Commonwealth Court proceedings. Order, 104 MM 2020, 6/17/2020.

In his Application, the Governor argues that this Court should declare H.R. 836 null and void under the Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-41. We now address the merits of the Governor's Application and the Senators' Briefs. [8]

II. Presentment

***4** This dispute concerns whether the concurrent resolution is subject to the presentment requirement embodied in the Pennsylvania Constitution. In common parlance, the question is whether H.R. 836 is subject to the Governor's veto power. Our Commonwealth's Constitution provides:

> Every order, resolution or vote, to which the concurrence of both Houses may be necessary, except on the question of adjournment, shall be presented to the Governor and before it shall take effect be approved by him, or being disapproved, shall be repassed by two-thirds of both Houses according to the rules and limitations prescribed in case of a bill.

PA. CONST. art. III, § 9. That text has remained virtually unchanged since 1790. *See* PA. CONST. of 1790, art. I, § 23, PA. CONST. of 1838, art. I, § 24, PA. CONST. of 1874, art. III, § 26. Our Constitution is clear: *all* concurrent resolutions, except in three narrow circumstances identified below, must be presented to the Governor for his approval or veto. To allow a concurrent resolution that does not fit into one of the exceptions to take effect without presentment would be to authorize a legislative veto. In *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987), we adopted the reasoning of the Supreme Court of the United States in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), and found that the provisions of Article III, Section 9 "are integral parts of the constitutional design for the separation of powers." *Sessoms*, 532 A.2d at 778 (quoting *Chadha*, 462 U.S. at 946, 103 S.Ct. 2764). "[U]nder our Constitution[,] the legislative power, even when exercised by concurrent resolution, must be subject to gubernatorial review." *Id.* at 782; *see also W. Shore Sch. Dist. v. Pa. Labor Relations Bd.*, 534 Pa. 164, 626 A.2d 1131, 1135-36 (1993). Because the Senators contend that H.R. 836 fits into one of the three recognized exceptions to presentment, we examine those exceptions in turn.

A. The Exceptions to Presentment

The first exception to presentment is obvious from the plain text of Article III, Section 9. Any concurrent resolution "on the question of adjournment" need not be presented to the Governor. No party avers that H.R. 836 involves adjournment.

The second exception to presentment is a concurrent resolution proposing a constitutional amendment. The Constitution itself, specifically Article XI, Section 1, provides the "complete and detailed process for the amendment of that document." *Kremer v. Grant*, 529 Pa. 602, 606 A.2d 433, 436 (1992). We have characterized the process of amending our Constitution as "standing alone and entirely unconnected with any other subject. Nor does it contain any reference to any other provision of the constitution as being needed .... It is a system entirely complete in itself; requiring no extraneous aid, either in matters of detail or of general scope, to its effectual execution." *Commonwealth ex rel. Att'y Gen. v. Griest*, 196 Pa. 396, 46 A. 505, 506 (1900). Because "submission to the governor is carefully excluded, ... such submission is not only not required, but cannot be permitted." *Id.* at 507; *see also Mellow v. Pizzingrilli*, 800 A.2d 350, 359 (Pa. Cmwlth. 2002) ("Article XI has vested the power to propose amendments in the General Assembly. Other than the express requirements set forth in Article XI, the procedure to be used in proposing such amendments is exclusively committed to the legislature."). No party argues that H.R. 836 is a proposed amendment to our Commonwealth's Constitution.

***5** The third exception to presentment is not explicitly delineated, but rather inheres in the structure of our Charter. The presentment requirement in Article III, Section 9 applies only to matters governed by constitutional provisions concerning the legislative power. *Griest*, 46 A. at 508. In other words, "it is perfectly manifest that the orders, resolutions, and votes which must be so submitted [to the Governor] are, and can only be, such as relate to and are a part of the business of legislation." *Id.* Although no provision of the Constitution explicitly withdraws non-legislative resolutions from the requirement of presentment, such resolutions involve only

internal affairs of the legislature. "Under the principle of separation of the powers of government, ... no branch should exercise the functions exclusively committed to another branch." *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (1977). The legislature, a co-equal branch of government, has "the sole authority to determine the rules of its proceedings." *Pa. AFL-CIO ex rel. George v. Commonwealth*, 563 Pa. 108, 757 A.2d 917, 923 (2000); *see also* PA. CONST. art. II, § 11 ("Each House shall have power to determine the rules of its proceedings ...."). Similarly, resolutions that are investigatory or ceremonial in nature, although not technically procedural, are solely within the purview of the legislature itself and need not be presented to the Governor, as such resolutions are not "a part of the business of legislation" that affects entities outside the legislative branch. *Griest*, 46 A. at 508.

As the Governor notes, "[i]n *Russ v. Commonwealth*, 210 Pa. 544, 60 A. 169 (1905), this Court explained the difference between resolutions that solely involve internal matters within the General Assembly and those that reach beyond the walls of its two chambers." Governor's Application at 17. In *Russ*, the General Assembly passed a resolution that allowed members of the Senate and the House of Representatives to attend a ceremony dedicating a monument to President Ulysses S. Grant and provided for expenses associated with the ceremony. In distinguishing between resolutions that involved only the internal affairs of the General Assembly and those with legal effect that require presentment, we wrote:

> If both houses had simply resolved to attend the exercises in a body, and to adjourn for a day for that purpose, it would have been no concern of the Governor, and they could have gone with or without his approval; but, if more was embodied in the resolution, amounting practically to an enactment authorizing special committees of the Senate and House to act on behalf of the state in making suitable the recognition which both branches of the Legislature had agreed upon, it was for the Governor to approve or disapprove.

Russ, 60 A. at 171. Thus, when the legislature seeks to "act on behalf of the state" by way of a concurrent resolution, that resolution must be presented to the Governor. *Id.*

Summarizing *Russ* and *Griest* in 1915, Attorney General Francis Brown opined:

> [N]ot all joint or concurrent resolutions passed by the legislature must be submitted to the Governor for his approval, but only such as make legislation or have the effect of legislating, *i.e.*, enacting, repealing or amending laws or statutes or which have the effect of committing the State to a certain action or which provide for the expenditure of public money. Resolutions which are passed for any other purpose, such as the appointment of a committee by the legislature to obtain information on legislative matters for its future use or to investigate conditions in order to assist in future legislation, are not required to be presented to the Governor for action thereupon.

Joint or Concurrent Resolutions, 24 Pa. D. 721, 723 (Pa. Att'y Gen. 1915); *see also Concurrent Resolutions*, 7 Pa. D. & C. (Pa. Att'y Gen. 1926) (embracing Attorney General Brown's opinion). We find that Attorney General Brown's formulation accurately relates the requirements of our Constitution and precedent. Specifically, we agree that whether a concurrent resolution requires presentment depends upon whether the resolution comprises legislation or has the effect of legislating.

Attorney General Brown correctly discerned that, when a court has to determine whether a concurrent resolution is an act of legislating, the court must look to the substance of that resolution, rather than adhering to a formulaic approach that confines the court to the title or label of the resolution. As the Governor's *amici* note, when the federal Constitutional Convention added a provision to the federal Constitution analogous to Article III, Section 9, *see* U.S. CONST. art. I, § 7, cl. 3, James Madison told

the Convention that, "if the negative of the President was confined to bills, it would be evaded by acts under the form and name of resolutions, votes, [etc.]."[9] The next day, Edmund Randolph moved to insert what is now Article I, Section 7, Clause 3 into the draft of the federal Constitution for the purpose of "putting votes, resolutions, [etc.], on a footing with bills." The Convention adopted the proposal.[10] That Pennsylvania's 1790 Convention occurred just after the adoption of the federal Constitution, and that the language in the two Constitutions is nearly identical lends support to the proposition that the substance of the resolution, rather the formal title or procedure used for passage, should govern whether the resolution has "the effect of legislating" and therefore must be presented to the Governor.

***6** The Senators do not dispute that resolutions with legal effect should be subject to presentment. *See* Senators' Brief at 23 ("In the practice of the Pennsylvania Legislature, bills and joint resolutions intended to have the effect of laws have been transmitted to the Governor for his approval.") (quoting CHARLES B. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA 94 (1883)). Rather, the Senators contend that neither the Governor's Proclamation nor H.R. 836 had legal effect, and, thus, H.R. 836 should not be subject to presentment.

Looking first to the Governor's Proclamation, it is obvious that this order had legal effect. The Proclamation transferred funds, suspended certain statutory and regulatory provisions, and activated the Pennsylvania National Guard. *See* Governor's Application at 26-27 (listing actions taken by various state agencies pursuant to the Proclamation). As we stated in *Friends of Danny DeVito*, "[t]he Emergency Code specifically recognizes that under its auspices, the Governor has the authority to issue executive orders and proclamations which shall have the full force of law." *Friends of Danny DeVito*, 227 A.3d at 892. The Proclamation had "the full force of law." *Id.*

The Senators claim that the Proclamation was merely "a declaration of fact" and "did not (and could not) prescribe the rules of civil conduct and, instead, established the factual predicate necessary for other executive agencies to use certain powers granted to them by statute." Senators' Brief at 27; *see also id*. at 28 ("[E]mergency proclamations [a]re not laws, but rather formal announcements that create[ ] the circumstances necessary for the exercise of certain statutory powers."). Setting aside the Proclamation's direct legal effects, to distinguish between the Governor authorizing other agencies to act and those other agencies taking actions pursuant to the Proclamation would be to elevate form over substance. But for the Proclamation authorizing other agencies to act, those other agencies could not have issued orders with the force of law, such as requiring the closure of certain businesses. If nothing else, the legal effect of the Proclamation was to allow the Governor to exercise powers granted to him by the General Assembly upon the declaration of a disaster emergency.

Turning to H.R. 836, the Senators argue that this resolution "does not provide for expenditure of public funds and does not commit the state to an affirmative act." *Id.* at 30. With regard to the expenditure of public funds, we have ruled that a concurrent resolution which spends public money requires presentment. For example, in *Russ*, we decided that, had the General Assembly simply adjourned to attend the ceremony in question, the resolution would not have required presentment. Yet, when the legislature committed public money to the ceremony, the Governor's approval (or a vote overriding a veto) became necessary. *Russ*, 60 A. at 171. Similarly, in *Scudder v. Smith*, 331 Pa. 165, 200 A. 601 (1938), we determined that a joint resolution required presentment because the resolution both created a commission and appropriated $5,000 for that commission. *Id.* at 602-04. But while the expenditure of funds is a sufficient condition for requiring presentment, it is not a necessary one. *See Joint or Concurrent Resolutions*, 24 Pa. D. at 721 (opining that resolutions "which have the effect of committing the State to a certain action *or* which provide for the expenditure of public money" require presentment) (emphasis added). The General Assembly can pass a bill or resolution that has legal effect even if the bill or resolution does not commit the Commonwealth to spending any money. Each time the General Assembly adds a new crime to our Criminal Code, certain conduct becomes illegal. One could not argue that the General Assembly could amend the Criminal Code through a bill or concurrent resolution without presentment simply because that bill or resolution did not appropriate funds. *Cf. Commonwealth v. Kuphal*, 347 Pa.Super. 572, 500 A.2d 1205, 1216-17 (1985) (Spaeth, P.J., dissenting) (declaring that "[t]he conclusion is therefore inescapable that" a concurrent resolution that rejected sentencing guidelines was an "exercise of legislative power" that required presentment).

***7** Effectively acknowledging a non-expenditure-based category of legislative resolution, the Senators aver that, because H.R. 836 "does not authorize any action on behalf

of the state," Senators' Brief at 31, the resolution was not a legislative action. Although in *Russ* we noted that a resolution authorizing the General Assembly "to act on behalf of the state" would require presentment, *Russ*, 60 A. at 171, [11] the purported distinction between requiring the government affirmatively to act and prohibiting the government from taking an action is no distinction at all.

In *West Shore*, we considered whether the General Assembly could use a concurrent resolution, without presentment, to reestablish the Pennsylvania Labor Relations Board ("PLRB") after the agency was slated to be disbanded. We ruled that "[m]erely the passage of a resolution by both chambers ... reestablish[ing] an agency set for termination ... violates Article 3, Section 9 of our State Constitution." *West Shore*, 626 A.2d at 1136. By way of further example, imagine that an executive branch agency promulgates a new regulation that requires all businesses to purchase a fire extinguisher. The General Assembly, disagreeing with this regulation, passes a concurrent resolution overturning the regulation. That concurrent resolution does not require the executive branch to take any affirmative steps. To the contrary, the resolution forbids the executive branch from acting to enforce the regulation. But one could not characterize the General Assembly's resolution, in this scenario, as intending no legal effect and thereby functioning differently than any other prohibitory legislation. Just as a business's legal obligations would be affected by promulgation of the regulation, those same legal obligations would be affected by its repeal. [12]

H.R. 836 acts in the same manner as the resolutions in *West Shore* and the above hypothetical. Even if the Senators are correct that H.R. 836 does not require any affirmative act on behalf of the Governor, the same was true in *West Shore*. There, the concurrent resolution did not require the executive branch to act; it simply mandated that the executive branch not allow the PLRB to terminate. Prohibiting the termination of the PLRB had legal effect, just as prohibiting an agency from enforcing a regulation would have legal effect.

***8** Related to the Senators' argument, the Dissenting Opinion ("Dissent") asserts that Section 7301(c)'s language regarding a concurrent resolution "does not bear on the essential relationship to conventional legislation." Dissent at ——. As noted above, the inclusion of Article III, Section 9 in our Constitution is not simply to require presentment for "conventional legislation," but rather to require presentment for all bills, "resolutions, votes, [etc.]," Statement of James Madison (Aug. 15, 1787), *supra*, that have the *effect* of legislating. Any resolution passed by the General Assembly pursuant to Section 7301(c), including H.R. 836, has the effect of legislating. The resolution intends to prevent the Governor from carrying out powers delegated to him under the Emergency Services Management Code, powers which are enforceable with "the force and effect of law." 35 Pa.C.S. § 7301(b); *see also Friends of Danny DeVito*, 227 A.3d at 872.

As *amici* observe, H.R. 836 "would drastically alter the enforcement and suspension of certain state laws and regulations, economic activity across a wide variety of sectors, medical and healthcare practices, public health operations, National Guard deployment and other aspects of everyday life for millions of Pennsylvanians." [13] Enforcement of H.R. 836, which requires the Governor to end the state of disaster emergency, would have far-reaching legal consequences beyond the Governor simply signing and publishing a new proclamation. It would prohibit the Governor from taking legal actions, and that prohibition itself has legal effect. To distinguish between a resolution that requires the Governor to take affirmative action and a resolution that forbids him from enforcing the law would be to elevate form over substance and allow "the negative of the" Governor to be "evaded by acts under the form of resolutions," Statement of James Madison (Aug. 15, 1787), *supra*. Article III, Section 9 protects against such a result. Thus, H.R. 836 does not fit into the third exception to presentment.

The Dissent offers a novel view of both the text of our Constitution and our precedent regarding the constitutionality of the legislative veto. The Dissent posits that this Court should use a functionalist approach in determining whether a legislative veto passes constitutional muster. *See* Dissent at —— – —— ("I believe that the present context presents a compelling case that legislative vetoes should not be regarded as being *per se* violative of separation-of-powers principles."). Relative to this case, the Dissent suggests that "the breadth of the essential delegation of emergency powers to the executive in light of future and unforeseen circumstances justifies an equally extraordinary veto power in the Legislature." *Id.* at —— – —— n.2 (citing *Commc'n Workers of Am., AFL-CIO v. Florio*, 130 N.J. 439, 617 A.2d 223 (N.J. 1992)); *cf. id.* at —— ("In this respect, it is my considered judgment that the emergency-powers paradigm is essentially *sui generis*.").

To support its proposed exception to the requirement of presentment, the Dissent offers two points. First, the Dissent

does "not regard [*Sessoms*] as binding precedent in the present -- and very different -- context." *Id.* at ——; *cf. id.* at—— – —— n.3 (calling *Sessoms* "incompletely reasoned" because it "failed to recognize the exception to presentment requirement, deriving from the *Griest* decision, for matters that do not concern the business of legislating"). While we evaluated a different statute in *Sessoms*, our opinion there was clear: "[E]xcept as it relates to the power of each House to determine its own rules of proceedings, under our Constitution the legislative power, even when exercised by concurrent resolution, must be subject to gubernatorial review." *Sessoms*, 532 A.2d at 782. *Sessoms* repeatedly noted our adoption of the approach of the Supreme Court of the United States. *See id.* at 779-80 ("[O]nce [the legislature] makes its choice enacting legislation, its participation ends. [It] can thereafter control the execution of its enactment only indirectly—by passing new legislation.") (quoting *Bowsher v. Synar*, 478 U.S. 714, 733-34, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986)) (emphasis omitted); *id.* at 780, 106 S.Ct. 3181 (relying upon the reasoning of the *Chadha* Court that "the legislative branch" cannot "directly or indirectly ... retain some power over the execution of the laws"). We reiterated this interpretation of Article III, Section 9 in *West Shore*, *see West Shore*, 626 A.2d at 1135-36, and our lower courts also have reasoned that *Sessoms* provides no exception to presentment, other than those discussed above. *See, e.g.*, *MCT Transp. Inc. v. Phila. Parking Auth.*, 60 A.3d 899, 915 n.17 (Pa. Cmwlth. 2013) [14] ("In short, the General Assembly cannot exercise a legislative veto over an administrative agency's budget. The power of the veto belongs only to the executive."); *Dep't of Envtl. Res. v. Jubelirer*, 130 Pa.Cmwlth. 124, 567 A.2d 741, 749 (1989) [15] ("Nothing less than legislation may suffice to override the rule-making power of the [Environmental Quality Board] or any other executive agency."). That *Sessoms* did not discuss the *Griest* exception to presentment hardly renders *Sessoms* "incompletely reasoned," Dissent at —— n.3, especially inasmuch as we endorsed the same exception in *West Shore*, *see West Shore*, 626 A.2d at 1135 (noting that the resolution in question "had the effect of law"). The Dissent stands alone in deriving an exception to presentment from the type of legislation at issue.

***9** Related to this first point, the Dissent cites only decisions from the New Jersey Supreme Court and Justice Powell's concurrence in *Chadha*. *See* Dissent at —— – —— , ——. The New Jersey Supreme Court, of course, has free rein to interpret that state's Constitution, but New Jersey's approach, in *Florio* and *Enourato v. New Jersey Building Authority*, 90 N.J. 396, 448 A.2d 449 (1982), not only does not bind this Court; it also contradicts our approach to the legislative veto prescribed by our Constitution's presentment clause (Article III, Section 9) and our precedent in *Sessoms* and *West Shore*. And while Justice Powell's concurrence in *Chadha* also endorses a functionalist model for interpreting a presentment clause, the majority in *Chadha*, which this Court relied upon in *Sessoms*, rejected that model. *See Chadha*, 462 U.S. at 946, 103 S.Ct. 2764 ("The records of the Constitutional Convention reveal that the requirement that *all* legislation be presented to the President before becoming law was uniformly accepted by the Framers.") (emphasis added).

In sum, "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided" by characterizing the legislation as a delegation of emergency powers. *Id.* at 959, 103 S.Ct. 2764. A legislative veto in the context of a statute delegating emergency powers might be a good idea. It might be a bad idea. But it is not a *constitutional* idea under our current Charter.

B. Section 7301(c) Requires Presentment

Our conclusion that a concurrent resolution seeking to force the Governor to end a state of disaster emergency has legal effect and does not fit into any of the three recognized exceptions to presentment bears upon our interpretation of Section 7301(c) itself. The concurrent resolution provision of Section 7301(c) provides: "The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency." 35 Pa.C.S. § 7301(c). "[T]he best indication of legislative intent is the plain text of the statute." *Whalen v. Pa., Dep't of Transp., Bureau of Driver Licensing*, 613 Pa. 64, 32 A.3d 677, 679 (2011). Thus, we evaluate whether the plain text of Section 7301(c) expresses the General Assembly's intent that presentment not be a part of the concurrent resolution process in that provision.

The Senators, *see* Senators' Reply Brief at 8-12, and their *amicus* [16] aver that Section 7301(c) cannot be read to require presentment. Though providing little textual analysis, the Senators point to the words "at any time," "[t]hereupon," and "shall issue" to suggest that the General Assembly did not intend to require presentment for a concurrent resolution under the statute. *See* Senators' Reply Brief at 8. According

to *amicus*, "[t]he General Assembly purposely declined to include a veto mechanism in [S]ection 7301(c) and thereby made manifest its intent to require ministerial gubernatorial action whenever a concurrent resolution ends a state of disaster emergency."[17] We acknowledge that the Senators' reading of Section 7301(c) is a reasonable one. In particular, the word "[t]hereupon" could imply that the Governor must issue an executive order as soon as the General Assembly passes the concurrent resolution, without the Governor having an opportunity to approve or veto the resolution first. *See Thereupon*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Immediately; without delay; promptly.").

***10** However, the Senators' interpretation of Section 7301(c) is not the only reasonable reading of the statute. Section 7301(c) does not state unequivocally that the Governor's declaration of a disaster emergency is terminated the moment that the General Assembly passes a concurrent resolution purporting to do so. If the General Assembly intended to give itself the ability to terminate a state of disaster emergency unilaterally, there would have been no need to involve the Governor in the equation at all. If this had been the intent of the General Assembly, the language of Section 7301(c) would have been considerably more straightforward and truncated, *i.e.*, "the state of disaster emergency will be terminated by passage of a concurrent resolution so stating." Instead, the General Assembly chose to require an extra step: the Governor must terminate the declaration of disaster emergency. The requirement in Section 7301(c) that the Governor must act to end the disaster emergency is a sign that the General Assembly understood that its concurrent resolution would be presented to the Governor, in conformity and compliance with Article III, Section 9.[18]

The Concurring and Dissenting Opinion ("CDO") disagrees. Specifically, the CDO suggests that inclusion of a role for the Governor is "easily explained: the legislature wields no executive power in this limited context and has no means to retract the chief executive's previously-issued proclamation, or to issue a new declaration or proclamation undoing the previous one." CDO at 3. But that conclusion is beside the point. The General Assembly is well-aware that the power to declare or end a disaster emergency is not an exclusively "executive power."

As we explained in *Friends of Danny DeVito*, "[t]he broad powers granted to the Governor in the Emergency [Services Management] Code are firmly grounded in the Commonwealth's police power." *Friends of Danny DeVito*, 227 A.3d at 886. The Commonwealth's police power is not exercised by the Governor alone, but rather "is the inherent power of a body politic to enact and enforce laws for the promotion of the general welfare." *Commonwealth v. Barnes & Tucker Co.*, 472 Pa. 115, 371 A.2d 461, 465 (1977). The General Assembly, not just the Governor, can exercise the police power. *See Nat'l Wood Preservers, Inc. v. Dep't of Envtl. Res.*, 489 Pa. 221, 414 A.2d 37, 39 (1980) (adjudicating a dispute about whether a statue was "a constitutional exercise of the Legislature's police power"). Indeed, the General Assembly's very delegation of power to the Governor presupposed the General Assembly's inherent authority both to declare and to end disaster emergencies under its lawmaking powers. *See* PA. CONST. art. II, § 1 ("The legislative power ... shall be vested in a General Assembly ...."). The General Assembly has the power to terminate a declaration of disaster emergency without any action by the Governor, aside from presentment and an overriding vote in the event of a veto. If the legislature wishes to end a disaster emergency and satisfies presentment, followed either by gubernatorial approval or by veto override, then further action by the Governor would in any event be unnecessary. The Governor would simply be bound to follow the law.[19] If a statute or resolution is passed over the Governor's veto, the Governor still must abide by that law, even if the General Assembly does not specifically require that the Governor enforce that law. *See* PA. CONST. art. IV, § 2 ("The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed ...."). That the General Assembly decided to give the Governor a role in ending the emergency disaster declaration in Section 7301(c) is strong evidence that the General Assembly intended to abide by the Constitution, which also requires gubernatorial involvement.

***11** "Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction." *Commonwealth v. Herman*, 639 Pa. 466, 161 A.3d 194, 212 (2017). This canon of statutory interpretation is prescribed both by our General Assembly and by our precedent. The legislative branch has advised this Court that, "[i]n ascertaining the intention of the General Assembly in the enactment of a statute," we are to presume that the legislature "does not intend to violate the Constitution ... of this Commonwealth." 1 Pa.C.S. § 1922(3). Duly incorporating this codified presumption into our case law, we repeatedly have emphasized that, if a statute is susceptible of two

reasonable interpretations, we will interpret the statute in such a manner so as to avoid a finding of unconstitutionality. *See, e.g.*, *Commonwealth v. Veon*, 637 Pa. 442, 150 A.3d 435, 443 (2016); *MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n*, 577 Pa. 294, 844 A.2d 1239, 1249 (2004); *Commonwealth v. Bavusa*, 574 Pa. 620, 832 A.2d 1042, 1050 (2003). [20]

Applying the canon of constitutional avoidance, Section 7301(c) must be read to require presentment to the Governor. As discussed above, any resolution seeking to end a declaration of disaster emergency has the effect of legislating, necessitating presentment. Thus, although the Senators' interpretation of Section 7301(c) is reasonable, that interpretation would violate our Commonwealth's Constitution. Because there is another reasonable interpretation of Section 7301(c)—that the provision does require presentment—we must read the statute in that manner. Therefore, because H.R. 836 was not presented to the Governor and, in fact, affirmatively denied the Governor the opportunity to approve or veto that resolution, [21] H.R. 836 did not conform with the General Assembly's statutory mandate in Section 7301(c) or with the Pennsylvania Constitution.

The Dissent contends that application of the canon of constitutional avoidance should depend upon whether "the chosen construction substantially weakens the Legislature's ability to act as a check on the actions of a co-equal branch." Dissent at —— n.5. There is no basis in our jurisprudence to authorize creation of a sliding scale of constitutional avoidance based upon whether the provision at issue involves one branch's ability to control the affairs of another branch. The General Assembly has prescribed for this Court one standard for deciding constitutional avoidance questions: a presumption "[t]hat the General Assembly does not intend to violate the Constitution ... of this Commonwealth." 1 Pa.C.S. § 1922(3). We apply that standard today.

***12** Both the Governor and the Senators point to precedent from this Court where we have, and have not, applied the canon of constitutional avoidance in interpreting a statutory provision that did not explicitly require presentment of a concurrent resolution. For example, in *Sessoms*, we concluded that the General Assembly intended to require presentment in a statute providing that the General Assembly could reject sentencing guidelines adopted by the Pennsylvania Commission on Sentencing. *Sessoms*, 532 A.2d at 782; *see also* Governor's Application at 19. Conversely, in *West Shore*, we determined that we could not interpret a provision of the Sunset Act, Act of December 22, 1981, P.L. 508 No. 142, to require presentment. *West Shore*, 626 A.2d at 1135-36; *see also* Senators' Reply Brief at 10-12. That we reached differing conclusions in these two cases on the question of constitutional avoidance confirms what every legal practitioner knows to be true: every case, and every statute, must be evaluated independently. Evaluating Section 7301(c), we find that there are two reasonable interpretations, and, thus, we must apply our canon of constitutional avoidance as we weigh them.

Indeed, the case for constitutional avoidance in this case is stronger than in *Sessoms*. The statute at issue in *Sessoms* provided that "[t]he General Assembly may by concurrent resolution reject in their entirety any initial or subsequent guidelines adopted by the [Pennsylvania Commission on Sentencing] within 90 days of their publication in the Pennsylvania Bulletin." *Sessoms*, 532 A.2d at 776-77 (quoting the version of 42 Pa.C.S. § 2155(b) then in effect [22]). We interpreted Section 2155(b) to require presentment even though that provision did not mention the Governor. By contrast, the language of Section 7301(c) presents a stronger basis for reading the presentment requirement into the provision because the General Assembly explicitly provided for gubernatorial involvement.

In *Sessoms*, "we d[id] not find it fatal to" Section 2155(b) "that it d[id] not explicitly require presentment of a rejection resolution to the [G]overnor," as we could "imply such a condition to avoid finding the statute unconstitutional on its face." *Id.* at 782. Although *Sessoms* is helpful in terms of evaluating Section 7301(c), our language there expressed a truism: if a statute is ambiguous, a court should interpret that statute in such a manner as to avoid a finding of unconstitutionality. The *Sessoms* truism applied the canon of constitutional avoidance in the context of Article III, Section 9. We do so again today.

While the canon of constitutional avoidance leads us to the interpretation we adopt here, a reading of Section 7301(c) in its entirety further militates in favor of presentment. In the clearest language possible, the statute authorizes the Governor to declare that a disaster emergency has occurred or is imminent, to continue the state of disaster emergency until such time as the Governor finds that the threat or danger has passed, and, to the extent the threat has passed or an emergency no longer exists, to terminate the state of disaster emergency by executive order or proclamation. [23] Thus, while Section 7301(c) provides that the General Assembly

may terminate a state of disaster emergency at any time, the statute also provides that the state of disaster emergency ends only after the Governor so finds. By reading the presentment requirement into Section 7301(c), we afford meaning to all of the provisions of the statute. If the Governor does not agree with the General Assembly that the emergency has ended, the Governor can exercise a veto, a veto that, as with any other legislation, can be overridden by a two-thirds vote of both Houses of the General Assembly.

***13** Based upon the plain text of the statute and upon our canon counseling against invalidation of statutes on constitutional grounds where possible, we hold that Section 7301(c)'s provision allowing the General Assembly to terminate a state of disaster emergency by concurrent resolution requires presentment of that resolution to the Governor. Because the General Assembly did not present H.R. 836 to the Governor for his approval or veto, the General Assembly did not comply with its own statutory directive in Section 7301(c).

The Senators observe that, in *Friends of Danny DeVito*, regarding the concurrent resolution provision of Section 7301(c), we stated: "As a counterbalance to the exercise of the broad powers granted to the Governor, the Emergency Code provides that the General Assembly by concurrent resolution may terminate a state of disaster emergency at any time." *Friends of Danny DeVito*, 227 A.3d at 886; *see also id.* at 896 ("We note that the Emergency Code temporarily limits the Executive Order to ninety days unless renewed and provides the General Assembly with the ability to terminate the order at any time."). Nowhere in *Friends of Danny DeVito* did we state that the Emergency Services Management Code allows the General Assembly to terminate a state of disaster emergency by way of concurrent resolution without presentment. No party in *Friends of Danny DeVito* presented to this Court the questions of interpretation of the concurrent resolution provision or the constitutional demands of presentment. Nonetheless, that language accords with our decision today. Section 7301(c) does indeed contain a "counterbalance to the exercise of the broad powers granted to the Governor." *Id.* at 886. Confronted now with the duty to interpret Section 7301(c) and Article III, Section 9, and informed by the advocacy of the parties and *amici*, we conclude that the legislative counterbalance complies with the presentment requirement of our Commonwealth's Constitution. [24]

III. The Power to Suspend Laws

As an alternative argument, the Senators posit that the General Assembly could end the state of disaster emergency through a concurrent resolution without presentment under Article I, Section 12 of the Pennsylvania Constitution. *See* Senators' Brief at 31-45. That clause of our Constitution provides: "No power of suspending laws shall be exercised unless by the Legislature or by its authority." PA. CONST. art. I, § 12. The Senators appear to make two distinct arguments with regard to Article I, Section 12. First, they maintain that the provision gives the legislature the right to suspend laws unilaterally, essentially asking that this Court recognize a new exception to presentment. *See* Senators' Brief at 31-40. Second, the Senators contend that the Governor's powers under Section 7301(c) were a delegation of this suspension power and that this Court should permit the General Assembly to revoke its authority without presentment. *See id.* at 40-45.

A. Article I, Section 12 Does Not Give the Legislature the Power to Act Unilaterally

The history of Article I, Section 12 indicates that the clause was intended as a negative check on executive power, rather than an affirmative grant of power to the legislature to act unilaterally. English monarchs had long asserted a royal prerogative to suspend laws. "The suspending power was much more powerful than the veto because it allowed a king to nullify not only bills that were presented for his assent but also all statutes that pre-dated his reign—indeed, every law on the statute books." Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 278-79 (2009). After the Glorious Revolution of 1688, the English Parliament sought to limit the power of the monarch, specifically with regard to the suspension of laws. Thus, the 1689 "English Bill of Rights expressly barred the Crown from suspending the laws or issuing dispensations that permitted individuals to ignore certain laws." Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1365 (2013). The 1689 English Bill of Rights specifically faulted "the late King James the Second ... [for] suspending of laws and the execution of laws without consent of Parliament." 1 Wm. & Mary, ch. 2 in 3 Eng. Stat. at Large 441 (1689). Accordingly, that document declared "[t]hat the pretended power of suspending the laws or the execution of laws by regal authority without consent of Parliament is illegal." *Id.* § 1.

***14** As states began enacting constitutions after our Nation declared independence, the Framers of those Constitutions, still wary of executive power, adopted provisions similar to that in the 1689 English Bill of Rights. *See* Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534-35 (2012) (listing early state constitutions with similar clauses). For example, the Framers of early Virginia Constitutions "held [a] historic distrust [of concentrated executive power] based on the 'arbitrary practice' of English Kings before the Glorious Revolution of 1688," and endorsed a provision preventing the executive from suspending laws unilaterally. *Howell v. McAuliffe*, 292 Va. 320, 788 S.E.2d 706, 721 (2016). The Kentucky Supreme Court, noting that the clause in the Kentucky Constitution "was modeled after a similar provision in the Pennsylvania Constitution," stated that the clause "was originally designed to reflect the will of the framers to prevent suspension of duly-enacted laws by any entity other than the constitutionally-elected legislative body, a power the British government had ruthlessly exercised over the colonies." *Baker v. Fletcher*, 204 S.W.3d 589, 592 (Ky. 2006). Thus, Article I, Section 12, like the clauses in other early state constitutions, traces its roots to the 1689 English Bill of Rights. *See Nicolette v. Caruso*, 315 F. Supp. 2d 710, 726 (W.D. Pa. 2003).

The 1689 English Bill of Rights indicates that the analogous provision was aimed at preventing English monarchs from suspending laws on their own initiative and was not intended to transfer to Parliament the power to act unilaterally. Indeed, the text of the 1689 provision confirms this reading. After promulgation of the 1689 English Bill of Rights, the monarch could not suspend laws "without the *consent* of Parliament." 1 Wm. & Mary, ch. 2, § 1 (emphasis added). It appears that, rather than shifting the power to suspend laws from one branch to another, the purpose of the provision was to ensure a shared power between King or Queen and Parliament, a form of what we commonly refer to as checks and balances. [25] Imputing this historical understanding to our own Constitution, Article I, Section 12 does not empower the General Assembly to act alone, but rather distributes the power to suspend laws between the legislative and executive branches. [26]

The placement of Article I, Section 12 in our Constitution's Declaration of Rights further indicates that the provision is a negative check on executive power rather than an affirmative grant for the legislature to act without the Governor. Since 1790, the Framers of each of our Commonwealth's Constitutions have placed the clause involving the power to suspend laws in the section of the Constitution devoted to the protection of individual liberty. *See* PA. CONST. of 1790, art. IX, § 12, PA. CONST. of 1838, art. IX, § 12, PA. CONST. of 1874, art. I, § 12A, PA. CONST. art. I, § 12. "[T]hose rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government." *Gondelman v. Commonwealth*, 520 Pa. 451, 554 A.2d 896, 904 (1989). The Declaration of Rights exists to protect Commonwealth citizens from government tyranny, not to delineate the powers of any branch of government. *See* Senators' Reply Brief at 24 (opining that the placement of the clause in the Declaration of Rights is to "prevent tyranny of the Governor in capriciously ordering citizens to do something through the suspension of law"). To this end, the Declaration of Rights itself warns: "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate." PA. CONST. art. I, § 25. The Declaration of Rights, including Article I, Section 12, serves to protect individuals from an overbearing government in general, not to empower any department of that government. Article I, Section 12 therefore cannot, on its face, be read as a means by which to bypass presentment in acts suspending prior legislation, where presentment was required for their enactment.

***15** A comparison of Article I, Section 12 with other provisions of our Constitution that are exempt from presentment further supports this reading of the suspension power. As noted above, Article III, Section 9 explicitly exempts resolutions pertaining to adjournment from presentment. And Article XI of our Constitution sets forth a comprehensive scheme for amending the Constitution. *See Kremer*, 606 A.2d at 436 (describing Article XI as a "complete and detailed process for the amendment of that document"); *Griest*, 46 A. at 506 ("It is a system entirely complete in itself, requiring no extraneous aid, either in matters of detail or general scope, to its effectual execution."). Conversely, Article I, Section 12 neither offers explicit language exempting the suspension power from presentment nor describes a process in which the Governor has no role. It is unlikely that the Framers would have granted such a far-reaching power in such an obfuscated fashion. And authorizing the General Assembly to suspend laws unilaterally (*i.e.*, without presentment) is a far-reaching power indeed. To allow the legislature to suspend laws without presentment would be to excise both presentment clauses

from our Constitution. Article I, Section 12 does not limit the temporal duration for which a law can be suspended, nor does it specify which types of laws may be suspended. To grant the General Assembly such broad authority would be to rewrite our Constitution and remove the Governor from the lawmaking process. Such a view is inimical to our system of checks and balances, a system in which presentment plays a critical role.

Relatedly, this Court has characterized the power of suspending laws as part of the process of lawmaking. For example, when a party claimed that an action taken by the executive branch violated Article I, Section 12 and Article II, Section 1, which vests legislative power in the General Assembly, we read the two clauses together, writing that those provisions "vest[ ] legislative power in the General Assembly and give[ ] it the power to amend, repeal, suspend or enact statutes." *SEIU Healthcare Pa. v. Commonwealth*, 628 Pa. 573, 104 A.3d 495, 500 n.3 (2014); *see also McCreary v. Topper*, 10 Pa. 419, 422 (1849) ("That would be arrogating legislative power, and suspending law."). The suspension of statutes, like the amendment, repeal, or enactment of statutes, is a legislative action. And legislative actions are subject to presentment. *See* PA. CONST. art. III, § 9; *id.* art. IV, § 15.

Finally, we would be remiss to "disregard the gloss which life has written upon" suspension clauses in other constitutions. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring). In Kentucky, for example, which traces its suspension clause to our Constitution, *see Baker*, 204 S.W.3d at 592, when the legislature has suspended laws, it has done so through statutes presented to the Governor for his or her approval. *See, e.g.*, *Commonwealth ex. rel. Beshear v. Bevin*, 575 S.W.3d 673, 679-80 (Ky. 2019) (adjudicating a suspension clause case involving KY. REV. STAT. § 12.028, which was enacted through bicameralism and presentment); *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029, 1034 (1941) ("By this act of 1936 (Section 979b-5 *et seq.*, Statutes), the General Assembly has exercised that constitutional power and has authorized the courts to suspend the implications of the law which require entry and pronouncement of judgment without unreasonable delay. This law becomes a part of the statutory procedure and processes.").

The Senators call our attention to the suspension clause in the Louisiana Constitution. *See* Senators' Brief at 39. Yet the corresponding clause in that Constitution is fundamentally different from our own. Louisiana's Constitution, which houses the suspension clause in the article related to the legislative branch, provides:

> Only the legislature may suspend a law, and then only by the same vote and, except for gubernatorial veto and time limitations for introduction, according to the same procedures and formalities required for enactment of that law. After the effective date of this constitution, every resolution suspending a law shall fix the period of suspension, which shall not extend beyond the sixtieth day after final adjournment of the next regular session.

LA. CONST. art. III, § 20. Thus, the Louisiana Constitution explicitly exempts the suspension of laws from the Governor's veto; presentment is not required. *See also* David Alexander Peterson, *Louisiana's Legislative Suspension Power: Valid Method for Override of Environmental Laws and Agency Regulations?*, 53 LA. L. REV. 247, 255-56 (1992) (detailing the original history of the clause at the 1973 Louisiana Constitutional Convention and noting that the delegates specifically voted against subjecting suspension to gubernatorial veto). [27]

***16** Based upon the original history of Article I, Section 12, the Framers' decision to place that provision in our Declaration of Rights, a comparison between Article I, Section 12 and other provisions from which presentment is excluded, and the practice of other jurisdictions, we hold that Article I, Section 12 of the Pennsylvania Constitution does not affirmatively grant the General Assembly the power to suspend laws unilaterally. Rather, as an exercise in lawmaking, the suspension of laws must adhere to the requirement of presentment, an essential component of our Constitution's system of checks and balances. [28] Even if H.R. 836 amounted to a suspension of law by the General Assembly, that does not save it from the constitutional presentment requirement.

B. The General Assembly Cannot Use Unconstitutional Means to Overturn a Governor's Decision to Suspend Laws After Delegating That Power to the Governor

Finally, the Senators allege a violation of the non-delegation doctrine. In their initial brief, the Senators aver that, because the Governor's Proclamation itself was a suspension of law, "the General Assembly not only retained for itself—as it must—the ultimate authority for determining when a suspension of laws is no longer appropriate, but also specified the vehicle through which it may be exercised: a simple majority concurrent resolution." Senators' Brief at 42. For purposes of discussion, we assume, without deciding, that the Proclamation amounted to a suspension of law under Article I, Section 12.

In their self-styled "Reply Brief," the Senators argue, for the first time, that the Emergency Management Services Code itself is unconstitutional under the non-delegation doctrine. *See* Senators' Reply Brief at 2-7. "A claim is waived if it is raised for the first time in a reply brief." *Commonwealth v. Collins*, 598 Pa. 397, 957 A.2d 237, 259 (2008). However, assuming *arguendo* that we can address the broader non-delegation claim, it is unavailing.

The Senators' initial argument is puzzling. They aver that the non-delegation doctrine only kicks in if the Governor is correct in believing that the Proclamation was "law." Senators' Brief at 3. The Senators confuse an order having the effect of law with one exercising legislative power. The non-delegation doctrine forbids entities other than the legislative branch from exercising the "legislative power," as those entities do not have "the power to make law." *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 161 A.3d 827, 833 (2017).

The Governor does not argue that the Proclamation is a law in and of itself, but rather that the Proclamation has "the force of law." Governor's Application at 28; *see also* 35 Pa.C.S. § 7301(b) ("[T]he Governor may issue, amend and rescind executive orders, proclamations, and regulations which shall have the force and effect of law."). This may seem like a semantic difference, but it is not. Executive orders that affect individuals outside the executive branch "implement existing constitutional or statutory law." *Markham v. Wolf*, 647 Pa. 642, 190 A.3d 1175, 1183 (2018) (citing *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, 913 (1975)). But an executive order or an administrative regulation promulgated by an executive agency that implements a statute still has the *force of law*. Otherwise, no entity outside the executive branch could be compelled to abide by a regulation issued by an executive branch agency. Such a result would be inconsistent with long-standing precedent. *See, e.g.*, *Bell Tel. Co. of Pa. v. Lewis*, 317 Pa. 387, 177 A. 36 (1935) (overruling a non-delegation challenge to a statute that permitted the Governor to determine when telephone and telegraph lines could be constructed along highways).

***17** The Senators also cite our decision in *Protz* for the two limitations underlying the non-delegation doctrine: "First, ... the General Assembly must make the basic policy choices, and second, the legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions." *Protz*, 161 A.3d at 834 (internal quotation marks and citation omitted). The Emergency Services Management Code adheres to both standards.

The General Assembly, in enacting the statute, "ma[de] the basic policy choices." *Id.* The General Assembly decided that the Governor should be able to exercise certain powers when he or she makes a "finding that a disaster has occurred or that the occurrence of the threat of a disaster is imminent." 35 Pa.C.S. § 7301(c). In *Friends of Danny DeVito*, we reviewed whether the COVID-19 pandemic met that statutory definition, chosen by the legislature. *See Friends of Danny DeVito*, 227 A.3d at 885-92. That this Court relied upon the statute itself to make this ruling shows that the General Assembly, not the Governor, made the basic policy choices about which circumstances are necessary to trigger the Governor's powers under the statute.

Additionally, the General Assembly has provided "adequate standards which will guide and restrain" the Governor's powers. *Protz*, 161 A.3d at 834. The General Assembly gave the Governor specific guidance about what he can, and cannot, do in responding to a disaster emergency. *See* 35 Pa.C.S. §§ 7301(d)-(f), 7302, 7303, 7308. The powers delegated to the Governor are admittedly far-reaching, but nonetheless are specific. For example, the Governor can "[s]uspend the provisions of any regulatory statute ... *if strict compliance with the provisions ... would in any way prevent, hinder or delay necessary action in coping with the emergency*." *Id.* § 7301(f)(1) (emphasis added). Broad discretion and standardless discretion are not the same thing. Only those regulations that hinder action in response to the emergency may be suspended. It may be the case that the more expansive the emergency, the more encompassing the suspension of regulations. But this shows that it is the scope of the emergency, not the Governor's arbitrary discretion,

that determines the extent of the Governor's powers under the statute. The General Assembly itself chose the words in Section 7301(f)(1). The General Assembly, under its lawmaking powers, could have provided the Governor with less expansive powers under the Emergency Services Management Code. It did not do so.

Returning to the Senators' argument regarding the Governor's alleged suspension of law and the non-delegation doctrine, first, it is clear from the text of Article I, Section 12 and precedent that the General Assembly can delegate its suspension power to the executive branch. Article I, Section 12 states that the power of suspending laws can be exercised "by the Legislature or *by its authority*." PA. CONST. art. I, § 12 (emphasis added). During the Constitutional Convention of 1790, one delegate moved "to strike the words 'or its authority,' " a motion which the Convention rejected, indicating that a majority of the Framers intended the power to be delegable.[29] THE PROCEEDINGS RELATIVE TO THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA 261 (1825). This Court has confirmed that the power to suspend laws can be delegated. *See Young v. Fetterolf*, 320 Pa. 289, 182 A. 676, 680 (1936) ("The vesting in certain officials or persons by the legislative branch of government, of the power to suspend the operation of laws, has more than once received unequivocal judicial sanction.").[30] Even assuming that the Governor's delegated power under Section 7301(c) amounted to a power to suspend laws, this Court already has concluded that the Governor's actions do not violate the separation of powers doctrine, *Friends of Danny DeVito*, 227 A.3d at 892-93, and, as noted above, Section 7301(c) complies with the requirements of the non-delegation doctrine.

***18** In their distinct non-delegation argument with regard to the suspension of laws, the Senators contend that, when the Governor suspends laws pursuant to a delegation of authority, he "acts as the legislature's agent and, thus, is subject to any restrictions the General Assembly may see fit to put into place." Senators' Brief at 41. The same, however, could be said of the Governor's power to issue regulations, via an executive branch agency, when that power is delegated from the legislative branch. In such an instance, the Governor is acting as agent of the legislature, subject to the constraints in the authorizing statute. The Senators' argument implies that this Court should create a heightened standard for non-delegation when the delegated power is to suspend law, as opposed to issuing regulations with the force of law. *See id.*; *but see* Senators' Reply Brief at 25. As stated above, the power to suspend laws is part of the general legislative power, *see SEIU Healthcare*, 104 A.3d at 495; *McCreary*, 10 Pa. at 422, and we see no reason to treat suspending laws differently from enacting, amending, or repealing laws for the purpose of the non-delegation doctrine. Moreover, this Court already has declared that the "implication [of Article I, Section 12] does not alter the restrictions on delegating legislative decision making as embodied in Article II, Section 1." *W. Phila. Achievement Charter Elementary Sch. v. Sch. Dist. of Phila.*, 635 Pa. 127, 132 A.3d 957, 968 (2016); *see also* Senators' Reply Brief at 25 (noting that the delegation of the suspension power is "subject to the restrictions reflected in existing non-delegation principles drawn from Article II, Section 1," and citing *West Philadelphia*). Thus, the same restrictions on delegating power apply in all legislative contexts, including when delegating the power to suspend laws.

The Senators may be frustrated that, the General Assembly previously having delegated power to the Governor, the rescission of that power requires presentment, perhaps necessitating a two-thirds majority to override a veto. But the potential for such frustration inheres whenever the legislative branch delegates power to the executive branch in any context. The General Assembly itself decided to delegate power to the Governor under Section 7301(c). Current members of the General Assembly may regret that decision, but they cannot use an unconstitutional means to give that regret legal effect. The General Assembly must adhere to the constitutional requirement of presentment even when attempting to overturn the Governor's delegated putative authority to suspend laws.

Over one hundred years ago, when confronting a similar issue of a concurrent resolution and the need for presentment, we stated:

> The protection against unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail[s], the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of

> opinions upon points of right, reason, and expediency with the lawmaking power. ... If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it should be found that these principles are placed beyond legislative encroachment by the Constitution.

Russ, 60 A. at 173 (quoting COOLEY ON CONSTITUTIONAL LIMITATIONS, c. 7, §§ 4, 5 (6th ed. 1890)). Members of the General Assembly and residents of our Commonwealth have differing opinions on how to respond to the COVID-19 pandemic. Some may believe that the Governor's exercise of power under Section 7301(c) is necessary and proper. Others may feel that Section 7301(c), and the Governor's subsequent Proclamation, is "unwise and oppressive legislation." *Russ*, 60 A. at 173. As members of the judicial branch, we do not, and indeed cannot, take positions on such matters of policy, because, aside from the domain of common law, "setting public policy is properly done in the General Assembly and not in this Court." Senators' Reply Brief at 30. We "are not at liberty to declare statutes void of their apparent injustice or impolicy." *Russ*, 60 A. at 173. Our function is far more restrained. In this instance, we determine only whether the actions of our sister branches of government have complied with our Commonwealth's Constitution and statutory law.

***19** The General Assembly's attempt, through H.R. 836, to overturn the Governor's Proclamation of Disaster Emergency without presentment, violated Section 7301(c) of the Emergency Services Management Code. As an act with legislative effect, H.R. 836, like any concurrent resolution offered under Section 7301(c), required presentment, a key component of our Constitution's balance of powers among the several branches of government, a balance that prevents one branch from dominating the others. H.R. 836 did not meet the criteria allowing for any exception to presentment, and our interpretive canons compel us to read Section 7301(c) as requiring presentment. Additionally, Article I, Section 12 of the Pennsylvania Constitution does not empower the legislature to act unilaterally to suspend a law, and the Governor's purported suspension of law did not violate the non-delegation doctrine. Thus, because the General Assembly intended that H.R. 836 terminate the Governor's declaration of disaster emergency without the necessity of presenting that resolution to the Governor for his approval or veto, we hold, pursuant to our power under the Declaratory Judgments Act, 42 Pa.C.S. § 7532, that H.R. 836 is a legal nullity. [31]

Justices Baer, Todd and Donohue join the opinion.

Justice Dougherty files a concurring and dissenting opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Mundy joins.

CONCURRING AND DISSENTING OPINION

Justice Dougherty files a concurring and dissenting opinion.

The competing opinions authored by my learned colleagues offer thoughtful, well-intentioned analyses of the issues in this case of palpable and widespread importance. All things considered, however, I respectfully conclude that the majority has the better of the constitutional arguments with regard to the precise Article III, Section 9 claim raised by the Governor — namely, I agree "that a concurrent resolution seeking to force the Governor to end a state of disaster emergency has legal effect and does not fit into any of the three recognized exceptions to presentment[.]" Majority Op. at ——. But my alignment with the majority ends there, as I conclude the plain text of Section 7301(c) of the Emergency Management Services Code ("Emergency Code"), 35 Pa.C.S. §§ 7101-79a31, is unambiguous and reflects the legislature's intent to avoid the constitutional requirement of presentment. There being only one reasonable interpretation of the statute, I cannot join the majority's (understandable, even laudable) attempt to save Section 7301(c) from a finding of unconstitutionality by means of invoking the canon of constitutional avoidance. And, I am further compelled to conclude that, once Section 7301(c) is stripped of the legislature's intended safety valve, the severability doctrine instructs that — no matter how severe the consequences may be — the offending portion of the statute is non-severable.

I begin with the text. Section 7301(c) states, in relevant part: "The General Assembly by concurrent resolution

may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency." 35 Pa.C.S. § 7301(c). To me, this unusual statutory phrasing, with no analog in other statutes of which I am aware, plainly is directed at one thing and one thing only: avoiding presentment. The first sentence of Section 7301(c) quoted above reveals the legislature's unambiguous intent to reserve for itself the ability to terminate, by concurrent resolution, a state of disaster emergency **at any time**. The second sentence, in turn, unambiguously dictates what **shall** follow **thereupon**, *i.e.*, the Governor shall issue an executive order or proclamation ending the emergency. As the majority itself admits, the term "thereupon" is particularly elucidating since, when ascribed its natural and ordinary definition and applied in context, it reasonably can be read to mean "the Governor must issue an executive order as soon as the General Assembly passes the concurrent resolution, without the Governor having an opportunity to approve or veto the resolution first." Majority Op. at ——, *citing* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "Thereupon" as "[i]mmediately; without delay; promptly"). While I certainly agree with the majority that this reading of Section 7301(c) "is a reasonable one[,]" *id*., I would go further and declare it is the only reasonable one.

***20** The majority obviously disagrees. In its view, the statute is susceptible to multiple interpretations because it "does not state unequivocally that the Governor's declaration of a disaster emergency is terminated the moment that the General Assembly passes a concurrent resolution purporting to do so." *Id*. The majority also finds it relevant that Section 7301(c) mentions the Governor at all, and suggests his involvement in the process envisioned by the legislature "is strong evidence that the General Assembly intended to abide by the Constitution, which also requires gubernatorial involvement." *Id*. at ——. From my point of view, however, these points are easily explained: the legislature wields no executive power in this limited context and has no means to retract the chief executive's previously-issued proclamation, or to issue a new declaration or proclamation undoing the previous one; instead, that power, under the terms of the Emergency Code, resides exclusively with the Governor. *See* 35 Pa.C.S. § 7301(b) (explaining "**the Governor** may issue, amend, and rescind executive orders, proclamations and regulations") (emphasis added). As such, the most the legislature conceivably can do is demand a Governor retract such an order himself. That is precisely what this statute aims to do. It instructs that, if the legislature passes a concurrent resolution terminating a declaration of disaster emergency, "thereupon" the Governor shall act. It would have been impossible for the legislature to have written this statute in a way that omits any mention of the Governor whatsoever while simultaneously requiring some physical, executive action on his part.

Not only is the majority's interpretation unreasonable, it effectively rewrites the statute in an attempt to avoid the constitutional quandary altogether. Recall what the statute actually says: "The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency." 35 Pa.C.S. § 7301(c). Now consider the alternative reading afforded to the majority's interpretation: "The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. **[The Governor may then approve or veto the resolution. If the resolution is approved by the Governor or his veto is overridden, t]**hereupon, the Governor shall issue an executive order or proclamation ending the state of disaster emergency." In this way, it is obvious to see that the majority has inserted words (those that are bolded) to avoid any constitutional issue. Worse yet, the majority's insertion of words only make sense some of the time. What if, instead, the Governor fails to approve the resolution **and** the legislature fails to override his veto? In that not unlikely scenario, the entire second sentence of the statute becomes meaningless; even if the legislature passes a concurrent resolution, nothing "shall" happen "thereupon." That cannot possibly be what the legislature intended. *See, e.g.*, 1 Pa.C.S. § 1922(1) (presumption that the legislature "does not intend a result that is absurd, impossible of execution or unreasonable"). But of course, such an absurd interpretation should never come to pass, because the statute is facially unambiguous and, in any event, our rules of statutory construction preclude us from inserting words into the statute or rendering existing words superfluous. *See, e.g.*, 1 Pa.C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); 1 Pa.C.S. § 1922(2) (in ascertaining legislative intent, there is a presumption "[t]hat the General Assembly intends the entire statute to be effective and certain").

For much the same reason, given the explicit statutory language quoted above I respectfully disagree that this case may be resolved by reading the presentment requirement into the statute in accordance with our prior decision in

Commonwealth v. Sessoms, 516 Pa. 365, 532 A.2d 775 (1987). As the majority recites, in *Sessoms* " 'we d[id] not find it fatal to' " the legislation at issue " 'that it d[id] not explicitly require presentment of a rejection resolution to the [G]overnor' " since we determined we could " 'imply such a condition to avoid finding the statute unconstitutional on its face.' " Majority Op. at ——, *quoting Sessoms*, 532 A.2d at 782. But the same is not possible here because the statute **explicitly** dictates a contrary procedure, a situation we did not face in *Sessoms*. It's one thing to read an implied constitutional requirement into an otherwise silent statutory provision to save the statute from falling; it's quite another to strike an express provision out of a statute to make room for a contradictory implication that satisfies the constitutional command, or to ignore the express and unambiguous terms of the statute altogether. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, —— U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 3492641, at *18 (June 29, 2020) ("Constitutional avoidance is not a license to rewrite [the legislature]'s work to say whatever the Constitution needs it to say in a given situation.").

***21** In sum, I believe that Section 7301(c) is susceptible to only one reasonable interpretation — the one described by the plain terms of the statute itself. That plain language is clear, and leaves no room for the Governor to take any other action than that which is statutorily prescribed. Accordingly, while I have no doubt that it would be a far cleaner task to simply declare the statute ambiguous and apply the canon of constitutional avoidance to resolve this matter, that path is, unfortunately, unavailable to us. *See, e.g.*, *Robinson Twp. v. Commonwealth*, 637 Pa. 239, 147 A.3d 536, 574 (2016) ("Although courts should interpret statutes so as to avoid constitutional questions when possible, they cannot ignore the plain meaning of a statute to do so.") (citations omitted). That being the case, and since the statutory mechanism crafted by the legislature is clearly at odds with Article III, Section 9 of the Pennsylvania Constitution, it must be stricken as unconstitutional.

But this does not end the matter either. Section 1925 of the Statutory Construction Act provides that whenever any provision of any statute is held invalid, we must shift our consideration to "whether the statute can survive without those invalid provisions, with principal focus on the legislature's intent." *Commonwealth v. Hopkins*, 632 Pa. 36, 117 A.3d 247, 259 (2015), *citing, e.g.*, 1 Pa.C.S. § 1925. The legislature did not expressly state whether relevant portions of the subject statute are non-severable, but this of course is not dispositive. *See Stilp v. Commonwealth*, 588 Pa. 539, 905 A.2d 918, 972 (2006) (explaining we have "not treated legislative declarations that a statute is severable, or nonseverable, as 'inexorable commands,' but rather have viewed such statements as providing a rule of construction"). By its terms, moreover, Section 1925 creates a general presumption of severability for every statute, **unless** a court concludes that: (1) "the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one;" or (2) "the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent." 1 Pa.C.S. § 1925. No one here seriously disputes that this latter exception is not in issue, and the reason for this is straightforward: the Governor clearly can execute the other provisions of the statute after the language relating to the legislature's designed oversight mechanism is severed. Thus, the only arguable impediment to severing the portion of the statute that runs afoul of Article III, Section 9, lies within the first exception to the presumption of severability. I therefore turn to that exception and the principles that guide our review.

As noted, "[i]n determining the severability of a statute ..., the legislative intent is of primary significance." *Saulsbury v. Bethlehem Steel Co.*, 413 Pa. 316, 196 A.2d 664, 667 (1964). We have previously explained "[t]he 'touchstone' for determining legislative intent in this regard is to answer the question of whether, after severing the unconstitutional provisions of a statute, 'the legislature [would] have preferred what is left of its statute to no statute at all.' " *Nextel Commc'ns of Mid-Atl., Inc. v. Commonwealth*, 642 Pa. 729, 171 A.3d 682, 703 (2017), *quoting D.P. v. G.J.P.*, 636 Pa. 574, 146 A.3d 204, 216 (2016). We must also presume that the legislature carefully chose to include every provision of every statute it enacts. *See* 1 Pa.C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions."). Applying these principles, I am constrained to conclude that, absent the so-called legislative veto provision, we may not presume the legislature would have enacted the statute — at least not in its current form.

***22** To be sure, the comprehensive authority that the General Assembly granted the Governor to respond to an emergency is far more extensive and elaborately developed than the legislative-veto provision. But this comparative brevity says nothing about the provision's potency. On this front, I share

Chief Justice Saylor's view that it seems "quite unlikely that the Legislature would have conferred such a broad delegation of emergency powers upon the Governor while apprehending that the contemplated legislative oversight was subordinate to a gubernatorial veto, thus affording the executive the ability to require a supermajority vote." *Id*. at ——. Significant proofs support this position.

First, the bare fact that the legislature opted to include the language at all demonstrates that it must carry some significance. *See, e.g.*, 1 Pa.C.S. § 1921(a); 1 Pa.C.S. § 1922(2). Indeed, as we recently remarked (whether it be *dicta* or not), the purpose of the legislature's intended oversight mechanism is manifest: it serves "[a]s a counterbalance" to the broad powers granted to the Governor under the Emergency Code. *Friends of Danny DeVito v. Wolf*, —— Pa. ——, 227 A.3d 872, 886 (2020). And we are not alone in our view that the legislature's mechanism was intended to serve as a vital check on the otherwise far-reaching powers conferred under the Emergency Code, which give the Governor "the authority to declare one of the longest emergency declarations of any governor in the United States." *Id*. at 885 n.9 (citation omitted). [1]

In fact, the National Governors Association "characterizes the ability of a legislature to intervene to terminate a declaration of a state of emergency as a 'limitation on emergency powers[.]' " Patricia Sweeney, JD, MPH, RN, Ryan Joyce, JD, *Gubernatorial Emergency Management Powers: Testing the Limits in Pennsylvania*, 6 PITT. J. ENVTL PUB. HEALTH L. 149, 177 (2012), *quoting* National Governors Association Center for Best Practices, The Governor's Guide to Homeland Security at 14 (2007), http://www.nga.org/files/live/sites/NGA/files/pdf/0703GOVGUIDEHS.PDF. If the judicial and executive branches view the legislative-veto provision as an intentional means of curtailing the powers granted under the Emergency Code, then surely the legislature, the author of the statute, must ascribe at least as much significance to it — and likely far more. *Accord* Reply Brief for Respondents at 15 ("[C]ommon sense and experience dictate that each branch of government seeks to protect its institutional powers to the greatest degree practicable.").

***23** If more support for the conclusion that the legislature might prefer no statute over a stripped-down version were required, one need not look far. Turning back to the statutory language, I emphasize once more that it explicitly states the "General Assembly by concurrent resolution may terminate a state of disaster emergency **at any time**." 35 P.S.C. § 7301(c) (emphasis added). It continues, "[**t**]**hereupon,** the Governor **shall** issue an executive order or proclamation ending the state of disaster emergency." *Id*. (emphasis added). Again, the only reasonable meaning that can be attributed to this language — the bolded passages in particular — is that it shows the General Assembly's unambiguous intention that it be able to end the declaration without presentment.

To recognize the legislature's intent in this regard is to effectively answer the question of severability: because the legislature operated under the assumption it could end a state of disaster emergency without presentment, and the majority of this Court now reaches the opposite conclusion, "it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one[.]" 1 Pa.C.S. § 1925. Any notion that the device the legislature crafted to avoid presentment should be construed as some unimportant add-on, would be untenable. As I see it, not only does the relevant statutory language constitute a "prominent and central feature[ ] of the statute[,]" *Hopkins*, 117 A.3d at 259, it represents the legislature's unambiguous attempt to impose a critical (albeit unconstitutional) counterbalance to the Governor's sweeping exercise of delegated emergency powers.

As well, I note that in other cases that do not call into question the interplay between branches of our Commonwealth government, we have not hesitated to strike down statutes with non-severable, unconstitutional provisions even where "constitutional requirements can be said to have been satisfied in the abstract." *Commonwealth v. Wolfe*, 636 Pa. 37, 140 A.3d 651, 662 (2016). From my perspective, any effort to re-write the statute or ignore its plain language is merely a means to the same end — *i.e.*, permitting the constitutional requirement of presentment to be satisfied notwithstanding the fact that the statute explicitly aims to avoid exactly that. Respectfully, the unusual and urgent circumstances this case supplies do not permit us to abandon our duty to apply the severability doctrine in a consistent fashion, or to disregard the relevant interpretive principles. *See, e.g.*, 1 Pa.C.S. § 1921(a), (b); *Commonwealth v. Kirkner*, 569 Pa. 499, 805 A.2d 514, 516-17 (2002) ("[A] statute cannot be modified by judicial discretion, no matter how well-intentioned.") (citations omitted).

In summary and to reiterate, I would hold Section 7301(c) of the Emergency Code violates the Pennsylvania Constitution and the offending portion of the statute may not be severed. For the reasons outlined above, "it cannot be presumed the

General Assembly would have enacted the remaining valid provisions without the void one[.]" 1 Pa.C.S. § 1925. The presumption of severability having been rebutted, in my view, we are left with no choice but to declare the statute unsalvageable. [2]

DISSENTING OPINION

CHIEF JUSTICE SAYLOR

***24** In his prayer for relief, the Governor has asked this Court only to declare that Article III, Section 9 of the Pennsylvania Constitution renders the General Assembly's concurrent resolution requiring the termination of the renewed disaster emergency a legal nullity. *See, e.g.*, Application for the Court to Exercise Jurisdiction in *Wolf v. Scarnati*, 104 MM 2020 (Pa.), at 32. In this regard, the chief executive – as the petitioner – has avoided the question of what the Legislature intended when it prescribed, in Section 7301(c) of the Emergency Management Services Act, that the General Assembly, by concurrent resolution, may terminate a disaster emergency at any time. *See* 35 Pa.C.S. § 7301(c).

I have no objection to the majority's decision to consider the legislative intent underlying Section 7301(c), albeit that I differ with its reasoning and conclusion. In this regard, I also find that the narrow set of issues upon which the Governor wishes to focus cannot be wholly disentangled from the wider array of statutory and doctrinal considerations in play, particularly the overarching separation of powers concerns. *Cf. Kelly v. Legislative Coordinating Council*, 460 P.3d 832, 841 (Kan. 2020) (Stegall, J., concurring) (alluding to the "vexing separation of powers problems created when one branch of government delegates its power to another branch as the Legislature has done (in part)" in the Kansas Emergency Management Act, and opining that "[a]bsent a liberal interpretation of the Legislature's ability to continually oversee the Governor's exercise of delegated Legislative authority, the structure of [the Kansas Emergency Management Act] itself risks violating the constitutional demand of separate powers").

This dispute arises from the General Assembly's decision, consistent with that of many other state legislatures, that the chief executive is the most logical and efficacious first responder to emergencies affecting the public at large. Given both institutional constraints impacting legislative action and the Legislature's inability, as of the time of the enactment of the Emergency Management Services Code, to predict the character and timing of emergent circumstances as they might arise in the future, it delegated to the Governor the power to discern and declare an emergency. Correspondingly, it conferred upon the chief executive an extraordinary set of powers – including the authority to suspend laws and to commandeer private property if necessary – as essential countermeasures. [1] At the same time, the General Assembly quite rationally reserved to itself the ability to make its own assessment of whether the circumstances at hand rise to a disaster emergency and to override the Governor's declaration of an emergency upon the passage of a concurrent resolution. *See* 35 Pa.C.S. § 7301(c).

As the majority relates, facially Article III, Section 9 of the Pennsylvania Constitution suggests that all concurrent resolutions, *i.e.*, resolutions "to which the concurrence of both Houses may be necessary," PA. CONST. art. III, § 9, "shall be presented to the Governor" and are subject to a veto power on his part. *See id.* According to this Court's longstanding precedent, however, Article III, Section 9 is only applicable to resolutions that "relate to and are a part of the business of legislation." *See, e.g.*, *Commonwealth ex rel. Attorney General v. Griest*, 196 Pa. 396, 409, 46 A. 505, 508 (1900). The parties agree, at least in some passages in their submissions, that the question in this case distills to whether the concurrent resolution at hand satisfies this criterion. *See, e.g.*, Application for the Court to Exercise Jurisdiction in *Wolf v. Scarnati*, 104 MM 2020 (Pa.), at 21 ("[O]nly resolutions that 'make legislation *or have the effect of legislating*' must be so submitted [to the Governor]" (emphasis in original)); Brief for Petitioners in Support of Application for Expedited Summary Relief in *Scarnati v. Wolf*, 344 M.D. 2020 (Pa. Cmwlth.), at 20.

***25** The relevant terms of Section 7301(c) comprise, in effect, a legislative veto relative to a sweeping delegation of legislative power, which in my view does not bear the essential relationship to conventional legislation such as would have been within the framers' contemplation. [2] In this regard, I simply cannot envision that the framers of the Pennsylvania Constitution contemplated that the Governor could be invested with a panoply of exceptional powers – including the delegated power to suspend laws and commandeer private property – but that the Legislature nonetheless would be powerless to implement a counterbalance that was not then subject to the chief executive's own veto power. In this respect, it is my

considered judgment that the emergency-powers paradigm is essentially *sui generis*.

According to the majority, the 1987 decision in *Commonwealth v. Sessoms*, 516 Pa. 365, 532 A.2d 775 (1987), adopted *Chadha v. INS*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983), which contained broad language disapproving legislative vetoes in the abstract based upon separation-of-powers principles. *See id.* at 958-59, 103 S. Ct. at 2788. *Sessoms*, however, left the *Chadha*-related questions "largely unresolved," since the Court ultimately applied a plain-meaning interpretation of Article III, Section 9. *Sessoms*, 516 Pa. at 378-79, 532 A.2d at 781-82. [3]

The majority otherwise acknowledges what this Court has stated many times, namely, that "every case, and every statute, must be evaluated independently." Majority Opinion at ——; *accord*, *e.g.*, *Oliver v. City of Pittsburgh*, 608 Pa. 386, 395, 11 A.3d 960, 966 (2011) (explaining that the holding of a judicial decision is read against its facts). As related by Chief Justice John Marshall:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

***26** *Cohens v. State of Virginia*, 19 U.S. (6 Wheat.) 264, 399-400, 5 L.Ed. 257 (1821).

Consistent with this principle, to the degree *Sessoms* can be read to suggest an adherence to *Chadha* in its broadest construction, I do not regard the case as binding precedent in the present – and very different – context. Moreover, the criticisms of *Chadha*'s wide-ranging pronouncements disapproving legislative vetoes in the abstract are legion. *See, e.g.*, Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1250 n.63 (1986) (collecting articles).

I believe that the present context presents a compelling case that legislative vetoes should not be regarded as being *per se* violative of separation-of-powers principles. Rather, I would follow the lead of the New Jersey Supreme Court by recognizing that, "[w]here legislative action is necessary to further a statutory scheme requiring cooperation between the [legislative and executive] branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster." *Enourato v. N.J. Bldg. Auth.*, 90 N.J. 396, 448 A.2d 449, 451 (1982) (quoting *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438, 448 (1982)). And I can think of no more appropriate setting for the contemplated inter-branch cooperation and power-sharing to be intelligently and properly exercised than in the management of a disaster emergency.

For the above reasons, I would find that Article III, Section 9 does not apply to the concurrent resolution requiring the termination of the disaster emergency as renewed by the Governor, and such concurrent resolution does not offend the separation-of-powers doctrine. And, accordingly, I cannot agree with the majority's premise that the principle of constitutional avoidance supplies a reason to impose a construction on Section 7301(c), which, in any event, is inconsistent with the statute's plain language and apparent purposes.

In this regard, the Legislature knows well how to prescribe for presentment to the Governor in statutes. *See, e.g.*, Brief for Petitioners in Support of Application for Expedited Summary Relief in *Scarnati v. Wolf*, 344 M.D. 2020 (Pa. Cmwlth.), at 21 (citing 71 P.S. § 745.7(d), 53 P.S. § 42206(b)(1), 53 P.S. § 28206(b), and 53 P.S. § 12720.206(b)). Moreover, Section 7301(c) – which requires that the Governor *shall* issue an executive order terminating a disaster emergency *thereupon* after the issuance of a concurrent resolution – leaves no room for an intervening gubernatorial veto. [4] It also seems to me to be quite unlikely that the Legislature would have conferred such a broad delegation of emergency powers upon the Governor while apprehending that the contemplated legislative oversight was subordinate to a gubernatorial

veto, thus affording the executive the ability to require a supermajority vote. *Accord* Reply Brief for Respondents at 15 ("[C]ommon sense and experience dictate that each branch of government seeks to protect its institutional powers to the greatest degree practicable."). [5]

***27** Additionally, given that the concurrent-resolution provision of Section 301(c) plainly serves as an inter-branch check on the Governor's exercise of delegated emergency powers, the question presents itself whether that delegation would comport with constitutional norms if the contemplated oversight is greatly weakened by affording the Governor the ability to require such a supermajority to secure implementation. *See* PA. CONST. art. 2, § 1 ("The legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."). While I find this issue to reside well beyond the scope of what needs to be, and should be, decided here, I take the opportunity to observe that Respondents present a colorable argument that such dilution renders the entire Emergency Management Services Act unconstitutional. [6]

In summary, I would respond to the Governor's petition and request for relief by holding that Article III, Section 9 of the Pennsylvania Constitution does not require presentment of the concurrent resolution in issue here. In closing, I refer to a passage from Justice Powell's concurrence in *Chadha*, in which he stressed that the "boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental co-ordination.' " *Chadha*, 462 U.S. at 962, 103 S. Ct. at 2790 (quoting *J.W. Hampton, Jr. & Co. v. U.S.*, 276 U.S. 394, 406, 48 S. Ct. 348, 351, 72 L.Ed. 624 (1928)).

I agree, and hence, I respectfully dissent.

Justice Mundy joins this dissenting opinion.

All Citations

--- A.3d ----, 2020 WL 3567269

Footnotes

1 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. ed. 1914).

2 Governor Tom Wolf, *Proclamation of Disaster Emergency*, COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE GOVERNOR (Mar. 6, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/03/20200306-COVID19-Digital-Proclamation.pdf.

3 *See* Act of Nov. 26, 1978, P.L. 1332, No. 323.

4 Governor Tom Wolf, *Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining*, COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE GOVERNOR (Mar. 19, 2020), https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf.

5 Governor Tom Wolf, *Amendment to the Proclamation of Disaster Emergency*, COMMONWEALTH OF PENNSYLVANIA, OFFICE OF THE GOVERNOR (June 3, 2020), https://www.pema.pa.gov/Governor-Proclamations/Documents/06.03.2020%20TWW%20amendment%20to%20COVID%20disaster%20emergency%20proclamation.pdf.

6 Although "H.R. Con. Res. 836" is the proper abbreviation for a concurrent resolution, we refer to the resolution as "H.R. 836" for brevity's sake and to accord with the parties' briefs.

7 Megan Martin, Secretary of the Senate, Letter to Governor Tom Wolf, 6/10/2020.

8 In a letter filed June 15, 2020, the Senators stated, "In terms of the merits of the [Governor's] Application, the Senators, as noted by [the Governor], *see* Appl[ication] at 13 n.14, have already filed a substantive brief in the Commonwealth Court, *see Scarnati v. Wolf*, No. 344 MD 2020, and the Senators rely on the same to the extent the Court is looking for a response on the merits." Senators' No-Answer Letter, 104 MM, 6/15/2020, at 1. "The exercise of King's Bench authority is not limited by prescribed forms of procedure or to action upon writs of a particular nature; the Court may employ any type of process or procedure necessary for the circumstances." *In re Bruno*, 627 Pa. 505, 101 A.3d 635, 669 (2014). Thus, we agreed to decide the issues raised in the Governor's Application based upon the filings submitted to this Court and to the Commonwealth Court in *Scarnati v. Wolf*, 344 MD 2020. *See* Order, 104 MM 2020, 6/17/2020. We refer to the Governor's Application, which encompasses his legal arguments, as the "Governor's Application," and we

refer to the Brief of Petitioners in Support of Application of Expedited Summary Relief, which the Senators submitted to the Commonwealth Court, as the "Senators' Brief."

After granting King's Bench jurisdiction, a number of motions were filed. We take this opportunity to dispose of those motions.

First, we grant the Application of Representative Bryan Cutler and House Republican Caucus for Leave to Intervene as respondents. Representative Cutler and the House Republican Caucus (collectively, the "Representatives") state that their "interests ... are aligned with the Senate respondents." *Id.* at ¶ 12. Additionally, the Representatives note that they "will adopt and join in the Petition for Review filed by the Senate respondents and the" Senators' Brief. *Id.* at ¶ 14. Thus, we deem the Representatives to have joined the Senators' brief, rather than intending to file a separate brief with this Court. *See* Pa.R.C.P. 2328(a) (requiring that, in a petition to intervene, "[t]he petitioner shall attach to the petition a copy of any pleading which the petitioner will file in the action if permitted to intervene or shall state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed in the action"). Additionally, as the Governor is the petitioner in this Court, the decision to allow the Representatives to intervene is not to be considered a ruling as to whether the Representatives would have standing to intervene as petitioners in the Commonwealth Court.

Second, we grant the Senators' Application for Leave to File Reply Brief. Although the Senators are the respondents in this Court, we grant the application as a supplemental brief. For convenience, we refer to this document as the "Senators' Reply Brief."

Third, we grant the various applications for leave to file briefs as *amici curiae*. *See* Application of SEIU HealthCare Pennsylvania for Leave to Participate as *Amicus Curiae*; Application for Leave to File Brief as *Amici Curiae* by Members of the Democratic Caucuses of the Pennsylvania House of Representatives and Senate of Pennsylvania; Application of the Keystone Research Center and the Pennsylvania Budget and Policy Center for Leave to Submit *Amici Curiae* Brief *Nunc Pro Tunc* in Support of Petitioner; Application for Leave to File *Amicus* Brief by the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania, et al.; Application for Leave to File *Amicus Curiae* Brief on Behalf of the Commonwealth Foundation for Public Policy Alternatives; Application for Leave to File *Amici Curiae* Brief on Behalf of the Commonwealth Partners Chamber of Entrepreneurs, et al.

Fourth, we deny the Senators' Application for Leave to Present Oral Argument. This case involves a discrete legal issue, and there are no factual disputes. The parties, as well as *amici*, have provided ample and thoughtful briefing, and, because the subject matter of this case implicates constitutional questions concerning separation of powers as well as the effectiveness of legislative action relative to a rapidly evolving situation, it must be decided without unnecessary delay.

9 Brief of *Amici Curiae*, Members of the Democratic Caucuses of the Pennsylvania House of Representatives and the Senate of Pennsylvania, at 12 (quoting Statement of James Madison (Aug. 15, 1787), *in* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 431 (Jonathan Elliot, ed., 1827)).

10 *See* Statement of Edmund Randolph (Aug. 16, 1787), *in* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 431-32 (Jonathan Elliot, ed., 1827).

11 *Cf. Joint or Concurrent Resolutions*, 24 Pa. D. at 723 (writing that a concurrent resolution "which ha[s] the effect of committing the State to a certain action" would require presentment).

12 The Senators also cite *Fabrizio v. Kopriver*, 73 Dauph. 345 (Dauphin Cty. C.C.P. 1959). *See* Senators' Brief, Exhibit 2. In that case, the court of common pleas stated that, "if the resolution ... does not commit the State to any affirmative action, then such a resolution should not be within the purview of" Article III, Section 9. *Fabrizio*, 73 Dauph. at 348. The *Fabrizio* Court was comparing a concurrent resolution setting up a legislative investigating committee, but appropriating no funds, to the resolution in *Scudder*, where the resolution both set up a committee and appropriated funds. *Id.* at 348-49. Thus, while the action in *Scudder* involved the appropriation of funds, an affirmative act, it does not appear that the court of common pleas considered a scenario involving a resolution that forbid the executive branch from enforcing legal obligations. In any event, the decision of a court of common pleas, even if that particular court was the predecessor to the Commonwealth Court, *see* Senators' Brief at 25 n. 15, is not binding upon this Court and does not carry with it the weight of *stare decisis*.

13 Brief of *Amici Curiae*, Members of the Democratic Caucuses of the Pennsylvania House of Representatives and the Senate of Pennsylvania, at 9-10; *see also* Governor's Application at 22 (describing the same).

14 We issued two *per curiam* orders affirming the Commonwealth Court's decision. *See MCT Transp. Inc. v. Phila. Parking Auth.*, 622 Pa. 741, 81 A.3d 813 (2013) (*per curiam*); *MCT Transp. Inc. v. Phila. Parking Auth.*, 623 Pa. 417, 83 A.3d 85 (2013) (*per curiam*)

15 We vacated the decision of the Commonwealth Court on other grounds. *Dep't of Envtl. Res. v. Jubelirer*, 531 Pa. 472, 614 A.2d 204 (1992).

16 *See* Brief of *Amicus Curiae*, the Commonwealth Foundation for Public Policy Alternatives, in Support of Respondents, at 12-15.

17 Brief of *Amicus Curiae*, the Commonwealth Foundation for Public Policy Alternatives, in Support of Respondents, at 15.

18 This interpretation of Section 7301(c) accords with the procedures set forth in the Legislative Procedures Manual, which mirrors Article III, Section 9:

> Every order, resolution or vote, to which the concurrence of both houses is necessary, except on the question of adjournment and except joint resolutions proposing or ratifying constitutional amendments, is presented to the Governor and before it takes effect is approved by him or, being disapproved, may be repassed by two-thirds of both houses according to the rules and limitations prescribed in case of a bill.

101 PA. CODE § 9.245.

19 The CDO asserts: "It would have been impossible for the legislature to have written this statute in a way that omits any mention of the Governor whatsoever while simultaneously requiring some physical, executive action on his part." CDO at 3. We disagree. The General Assembly could have written the statute to provide for the termination of a state of disaster emergency without the Governor issuing a subsequent executive order or proclamation. Enactment of such a resolution, through the process of presentment, could end the state of disaster emergency immediately.

20 We note that, "[a]lthough courts should interpret statutes so as to avoid constitutional questions when possible, they cannot ignore the plain meaning of a statute to do so." *Robinson Twp. v. Commonwealth*, 637 Pa. 239, 147 A.3d 536, 574 (2016). Courts cannot disregard the General Assembly's intent, as evinced by the plain text of the statute, and rewrite that statute in order to avoid a constitutional question. In this instance, our close examination reveals that the statutory provision in question is susceptible to two reasonable interpretations.

21 *See* H.R. 836 (requiring the Secretary of the Senate to "notify the Governor of the General Assembly's action with the directive that the Governor issue an executive order or proclamation ending the state of disaster emergency"); *see also* Megan Martin, Secretary of the Senate, Letter to Governor Tom Wolf, 6/10/2020 ("I am notifying you of the General Assembly's action and the directive that you issue an executive order o[r] proclamation ending the state of disaster emergency in accordance with this resolution and 35 Pa.C.S. § 7301(c).").

22 Section 2155(b) has since been amended by the General Assembly to read:

> **(b) Rejection by General Assembly.--***Subject to gubernatorial review pursuant to section 9 of Article III of the Constitution of Pennsylvania*, the General Assembly may by concurrent resolution reject in their entirety any guidelines, risk assessment instrument or recommitment ranges adopted by the commission within 90 days of their publication in the Pennsylvania Bulletin pursuant to subsection (a)(2).

42 Pa.C.S. § 2155(b) (emphasis added).

23 The Governor's role in declaring and ending a state of disaster emergency is clear:

> A disaster emergency shall be declared by executive order or proclamation *of the Governor* upon finding that a disaster has occurred or that the occurrence or the threat of a disaster is imminent. The state of disaster emergency shall continue *until the Governor* finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than 90 days unless renewed *by the Governor*. The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time. Thereupon, *the Governor shall* issue an executive order or proclamation ending the state of disaster emergency.

35 Pa.C.S. § 7301(c) (emphases added).

24 Having decided that Section 7301(c) is not facially unconstitutional, we need not reach the issue of whether any provision must be severed from the statute. *Cf.* CDO at 5-10; Senators' Reply Brief at 12-17.

25 Unlike in our system of government, in the United Kingdom presentment has evolved into a mere formality. However, even today, when Parliament passes a statute that suspends law, it appears that royal assent is still required. For example, Parliament's bill responding to the COVID-19 pandemic provided that "[a] relevant national authority may by regulations suspend the operation of any provision of this Act." Coronavirus Act of 2020, c. 7, § 88(1) (U.K.). That bill received royal assent. *See Royal Assent*, HOUSE OF LORDS HANSARD (Mar. 25, 2020), https://hansard.parliament.uk/lords/2020-03-25/debates/025CBE1A-37B3-4362-9FAC-94359D78E325/RoyalAssent.

26 Notably, past cases involving Article I, Section 12 have focused upon whether the executive branch violated the provision. *See, e.g.*, *Commonwealth v. Williams*, 634 Pa. 290, 129 A.3d 1199 (2015); *SEIU Healthcare Pa. v. Commonwealth*, 628

Pa. 573, 104 A.3d 495 (2014); *Hetherington v. McHale*, 10 Pa.Cmwlth. 501, 311 A.2d 162 (1973), *rev'd on other grounds*, 458 Pa. 479, 329 A.2d 250 (1974).

27 Federal practice adds support to our reading of Article I, Section 12. Although the federal Constitution contains no clause concerning the suspension of laws, it does state that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The federal clause does not mention Congress, but the Framers' decision to place the clause in Article I, dealing with legislative power, means that only Congress can suspend the writ of *habeas corpus*. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 562, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (Scalia, J., dissenting) ("Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I."); *Ex parte Merryman*, 17 F. Cas. 144, 148 (Taney, Circuit Justice, C.C.D. Md. 1861) ("[F]or I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress."). Each time Congress has suspended the writ of *habeas corpus*, it has done so through a statute, with presentment to the President. *See Hamdi*, 542 U.S. at 562-63, 124 S.Ct. 2633 (Scalia, J., dissenting) (listing statutes by which Congress has authorized suspension of the writ); *see also Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. ——, 140 S.Ct. 1959, —— L.Ed.2d ——, 2020 WL 3454809, at *19 (2020) (Thomas, J., concurring) (noting that, to the Framers, the clause suspending *habeas corpus* "likely meant a *statute* granting the executive the power to detain without bail or trial based on mere suspicion of a crime of dangerousness") (emphasis added). Thus, Congress has understood its power to suspend the writ of *habeas corpus* to require presentment.

28 The Senators additionally contend that the legislature can suspend laws either through a bill or concurrent resolution. *See* Senators' Brief at 39. We do not decide whether it is a bill or a concurrent resolution that is required to suspend a law. Whichever constitutional method the General Assembly employs, presentment is required.

29 The language in our 1790 Constitution did not include a second instance of the word "by." *See* PA. CONST. of 1790, art. IX, § 12 ("That no power of suspending laws shall be exercised, unless by the legislature, or its authority.").

30 *Cf. Thuraissigiam*, 591 U.S. at ——, 2020 WL 3454809, at *19, *21-22 (Thomas, J., concurring) (relating that the Framers of the federal Constitution contemplated, and early state statutes allowed, a delegation of power to the executive to suspend the writ of *habeas corpus*); *Young*, 182 A. at 679 n.2 (noting that "[t]he actual suspension of [the] writ [of *habeas corpus*], however, has always been done by presidential proclamation" pursuant to a delegation from Congress).

31 Having resolved this case, we lift our order staying the proceedings of the Commonwealth Court in *Scarnati v. Wolf*, 344 MD 2020. *See* Order, 104 MM 2020, 6/17/2020.

1 There are various legislative efforts underway that seek to reduce the length of such declarations. *See, e.g.*, H.B. 2428, 204th Gen. Assemb., Reg. Sess. (Pa. 2020) (referred to Committee on State Government, Apr. 24, 2020) (proposing reduction to 45 days); S.B. 1174, 204th Gen. Assemb., Reg. Sess. (Pa. 2020) (referred to Veterans Affairs and Emergency Preparedness, June 5, 2020) (proposing reduction to 30 days); S.B. 1160, 204th Gen. Assemb., Reg. Sess. (Pa. 2020) (referred to Veterans Affairs and Emergency Preparedness, June 5, 2020) (proposing reduction to 10 days). Of course, the issue of presentment will likely prove to be a hurdle in any of these efforts. As one of the many *amicus* parties in this matter rhetorically observes, "a lower threshold ... would be required for the impeachment of a Governor" than it would take to override a veto of H.R. 836 or any other legislation seeking to alter the Emergency Code. Brief of *Amicus Curiae*, the Commonwealth Foundation for Public Policy Alternatives, in Support of Respondents, at 20 (emphasis omitted). *Amicus* has exaggerated for dramatic effect, perhaps, but the point is well taken.

2 I recognize a finding of non-severability is strong medicine in the present matter, which involves governmental power to confront a pandemic emergency. Although it has played no role in my consideration of the purely legal issues involved, I observe that in *Friends of Danny DeVito* we noted the Governor has actually invoked **three statutory grounds** for his administration's authority to address the present pandemic: "the [Emergency Code]; [S]ections 532(a) and 1404(a) of the Administrative Code, 71 P.S. § 532; 71 P.S. § 1403(a); and the Disease Prevention and Control Act (the "Disease Act"), 35 P.S. § 521.1-521.25." 227 A.3d at 880.

There is no challenge presently before us to any source of authority other than the Emergency Code, and as far as I am aware, the various powers conferred by those statutes are not tied to the fate of Section 7301(c). *See, e.g.*, 71 P.S. § 532(a), (c) ("The Department of Health shall have the power, and its duty shall be ... [t]o protect the health of the people of this Commonwealth, and to determine and employ the most efficient and practical means for the prevention and suppression of disease; ... and to enforce quarantine regulations[.]"); 71 P.S. § 1403(a) ("It shall be the duty of the Department of Health to protect the health of the people of the State, and to determine and employ the most efficient and

practical means for the prevention and suppression of disease."); 35 P.S. §§ 521.1-521.25 (pertaining to quarantine and other control measures in response to communicable diseases).

1 As the majority explains, the power to suspend laws is commended to the General Assembly in the Pennsylvania Constitution's Declaration of Rights. *See* PA. CONST. art. I, § 12 ("No power of suspending laws shall be exercised unless by the Legislature or by its authority.").

2 This is not to say that a legislative veto of the Governor's emergency declaration does not raise independent separation-of-powers concerns. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 959, 103 S. Ct. 2764, 2788, 77 L.Ed.2d 317 (1983) (holding that a unicameral Congressional veto power over determinations to suspend deportations of discrete individuals violated the separation-of-powers doctrine). In this instance, however, as further developed below, I am of the view that the breadth of the essential delegation of emergency powers to the executive in light of future and unforeseen circumstances justifies an equally extraordinary veto power in the Legislature. *Cf. Communications Workers of Am., AFL-CIO v. Florio*, 130 N.J. 439, 617 A.2d 223, 232-33 (1992) ("Where legislative action is necessary to further a statutory scheme requiring cooperation between the [legislative and executive] branches, and such action offers no substantial potential to interfere with exclusive executive functions or alter the statute's purposes, legislative veto power can pass constitutional muster." (citation omitted)); Reply Brief for Respondents at 1 (positing that, under Pennsylvania's Emergency Management Services Code, the Governor is to govern "in partnership with the legislature").

3 Notably, the *Sessoms* Court failed to recognize the exception to the presentment requirement, deriving from the *Griest* decision, for matters that do not concern the business of legislating. *See Sessoms*, 516 Pa. at 379-80, 532 A.2d at 781-82. This omission seems materially problematic, since the Court otherwise announced that the Legislature's prescription for commission-created sentencing guidelines had "done no more than direct that the courts take notice of the Commission's work" and "[o]nly in this limited way" could the guidelines "be given effect beyond the confines of the General Assembly[.]" *Id.* at 377, 532 A.2d at 781. In this regard and otherwise, *Sessoms* was incompletely reasoned.

4 The majority posits that, under Section 7301(c), a state of disaster emergency ends "only after the Governor so finds." Majority Opinion at ——. But under the concurrent resolution provision of the statute, the Governor's mandatory obligation to issue an executive order or proclamation ending an emergency is triggered "thereupon" after the General Assembly's issuance of such a resolution. 35 Pa.C.S. § 7301(c). For these reasons, I also find unpersuasive the majority's position that the mere ministerial involvement of the Governor in this latter process implies presentment under Article III, Section 9. *See* Majority Opinion at ——.

Ultimately, I believe my difference with the majority's analysis on this point stems from my understanding that the statute provides for two distinct ways a disaster emergency can end: one initiated by the Governor, *see* 35 Pa.C.S. § 7301(c) ("The state of disaster emergency shall continue until the Governor finds that the threat or danger has passed ...."), and the other initiated by the Legislature, *see id*. ("The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time.").

Thus, I respectfully disagree with the concept that, to "afford meaning to all of the provisions of the statute," the Governor's input must sought via presentment when the Legislature initiates the termination. Majority Opinion, at ——.

5 I view the majority's decision to imply a presentment requirement into the statute as being in tension with the rule that courts are not at liberty to insert words into statutory provisions that the legislative body has not included. *See, e.g.*, *Burke v. Independence Blue Cross*, 628 Pa. 147, 159, 103 A.3d 1267, 1274 (2014). As noted above, when the Legislature has chosen to require presentment, it has said so. *See, e.g.*, 71 P.S. § 745.7(d) ("If the General Assembly adopts the concurrent resolution by majority vote in both the Senate and the House of Representatives, the concurrent resolution shall be presented to the Governor ...."). Thus, its failure to do so here does not appear to be unintentional.

Moreover, while the principle of constitutional avoidance – on which the majority relies, *see* Majority Opinion, at ——— is an important judicial tool for saving statutes when reasonably possible, the underlying justification is that the construction which avoids grave constitutional difficulties is likely to be faithful to legislative intent, as the legislative body does not intend to violate the Constitution. That underlying justification is diminished where, as here, the chosen construction substantially weakens the Legislature's ability to act as a check on the actions of a co-equal branch. The reason is self-evident: the General Assembly is not likely to seek to weaken its own institutional powers, particularly vis-à-vis those of a separate and co-equal branch of government. And while the majority correctly observes that the Legislature has clarified that it does not intend to violate the Constitution, *see* Majority Opinion, at —— (citing 1 Pa.C.S. § 1922(3)), that precept alone cannot justify the use of constitutional avoidance to reach an interpretation which was not intended by the General Assembly – particularly as the overarching purpose of *all* statutory construction is to give effect to legislative intent. *See* 1 Pa.C.S. § 1921(a). *See generally Clark v. Martinez*, 543 U.S. 371, 382, 125 S. Ct. 716, 725, 160 L.Ed.2d 734 (2005) (noting that constitutional avoidance is "a means of giving effect to congressional intent, not of subverting it").

6 Respondents argue:

> Any delegation of exclusive constitutional power by the General Assembly can only be lawfully done by guiding and restraining the exercise of the delegated power. *See Protz* [*v. WCAB (Derry Area Sch. Dist.*)], [639 Pa. 645] 161 A.3d [827,] 831 [(Pa. 2017)]. If the General Assembly is stripped of its unilateral power to immediately end a state of disaster emergency under Subsection 7301(c), then there is no restraint on the Governor, and he is able to freely and unilaterally exercise powers of the General Assembly, which unlawfully violates basic separation of powers principles.

Reply Brief for Respondents at 16 n.7; *see also id.* at —— – —— ("Without the concurrent resolution provision, the Governor's delegated powers under Section 7301 are virtually limitless and unrestrained, rendering the General Assembly a mere advisory body during emergencies declared the Governor, thereby consolidating both executive and legislative power into a single branch of government.").